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No. _____

In The
Supreme Court of the United States

HENRY H. CUNNINGHAM,

Petitioner,

v.

ROBERT R. PEREZ,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

GLENN S. DRAPER
2212 Queen Anne Avenue North No. 510
Seattle, WA 98109
(206) 282-3367

MICHAEL PIERSON • ROBERT HELLER
(Counsel of Record)
RIDDELL WILLIAMS P.S.
1001 Fourth Avenue Plaza, Suite 4500
Seattle, WA 98154
(206) 624-3600
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

I. QUESTIONS PRESENTED FOR REVIEW

Does a police officer violate a father's constitutional right to due process when the officer uses coercive interview tactics with the father's children to extract false allegations of sexual abuse?

Does a police officer violate a father's constitutional right to due process when the officer conceals his use of the coercive interview tactics from prosecutors?

II. LIST OF PARTIES TO THE PROCEEDINGS

The parties to the proceedings are:

Henry H. Cunningham, an individual; and

Robert R. Perez, an individual, formerly a police officer with the City of Wenatchee;

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V. STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit entered its judgment on October 3, 2003. Appendix 1. Petitioner Henry H. Cunningham ("Mr. Cunningham") seeks review of the judgment on a writ of certiorari.

On October 27, 2003, Mr. Cunningham timely filed a petition for rehearing en banc in the Court of Appeals. On November 21, 2003, the Court of Appeals entered an order denying the petition for rehearing en banc. Appendix 52. The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment of a federal court of appeals.

VI. CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Amendment XIV, which provides in part:

> . . . nor shall any state deprive any person of life, liberty or property without due process of law.

42 U.S.C. § 1983, which provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

VII. STATEMENT OF THE CASE

This case arises from the now-discredited "Wenatchee Witch Hunt" prosecutions in Wenatchee, Washington in 1994-1995. See generally *Devereaux v. Abbey*, 263 F.3d 1070, 1073 (9th Cir. 2001) (noting that ultimately 43 adults were charged with over 29,000 counts of sexual molestation in a sexual abuse "witch hunt").[1] The majority of the convictions obtained in the "Witch Hunt" prosecutions were overturned after post-conviction investigations revealed a pattern of abuses, including the coercive and suggestive interviewing of child witnesses. Stephen

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[1] The "Witch Hunt" prosecutions have produced a plethora of opinions. In addition to *Devereaux* and the decisions in the instant case, courts have discussed various aspects of the "Witch Hunt" in *Gausvik v. Perez*, 345 F.3d 813 (2003), a companion case to *Cunningham v. Perez*; *Gausvik v. Perez*, 239 F. Supp.2d 1067 (2002); *Everett v. Perez*, 78 F. Supp.2d 1134 (1999); *Roberson v. Perez*, ___ P.3d ___, 2004 WL 170459 (Wash. Ct. App. Jan. 29, 2004); *Everett v. Abbey*, 31 P.3d 721 (2001); *Rodriguez v. Perez*, 994 P.2d 874 (2000); *State v Carroll M.D.*, 983 P.2d 1165 (1999); *Vazquez v. DSHS*, 974 P.2d 348 (1999); and *State v. Connie J.C.*, 937 P.2d 1116 (1997).

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A. PROCEDURAL HISTORY

Mr. Cunningham was convicted of 23 counts of child sexual abuse in August, 1994. He was sentenced to more than 47 years in prison. In March, 1999, with the agreement of the prosecuting attorney, the Washington Court of Appeals vacated his conviction and ordered his release. Prosecuters decided not to re-try him, and the charges against Mr. Cunningham were dismissed with prejudice on a joint motion filed by Mr. Cunningham and the prosecuting attorney.

Mr. Cunningham then filed a civil rights action against Robert Perez, the lead investigator in the "Witch Hunt" prosecutions, as well as other police and government officials. In August, 2002, the Eastern District of Washington denied Officer Perez's motion for summary judgment based on qualified immunity. Appendix 41. On interlocutory appeal, the Ninth Circuit reversed, holding that Officer Perez was entitled to qualified immunity for his conduct during the investigations. Appendix 1. Mr. Cunningham now seeks review in this Court by writ of certiorari.

B. NEWLY-APPOINTED DETECTIVE ROBERT PEREZ INVESTIGATES THE CUNNINGHAM FAMILY.

In 1994, Henry Cunningham lived in Wenatchee, Washington with his wife, Connie, and three of his four children: Jennifer, then 19; Sarah, then 17; and Jessica, then 15. In May of that year, Mr. and Mrs. Cunningham

decided to place Jessica, then 15, in Pinecrest Hospital because of her drug use and other behavior problems. Pinecrest Hospital was a locked, in-patient adolescent psychiatric facility located in Coeur D'Alene, Idaho.

At Pinecrest, Jessica claimed to have "remembered" that her father sexually abused her when she was five years old in Moses Lake, Washington. This allegation was forwarded to the Child Protective Services Wenatchee Office, which in turn forwarded it to the Wenatchee Police Department ("WPD") and Officer Robert Perez. In January of that year, Officer Perez had been rotated into the Crimes Against Persons Detective position at the Wenatchee Police Department. It was his first assignment as a detective.

Mr. Cunningham, who has a long history of mental illness, learned about the allegation from his psychiatrist on or about June 2, 1994. The psychiatrist told Mr. Cunningham to call the WPD to clear up this false allegation. Mr. Cunningham called early on the morning of June 3, 1994, and was instructed to speak with Officer Perez. Officer Perez told Mr. Cunningham he would not speak to him over the phone, and directed him to come to the police station. Mr. Cunningham arrived at the station at approximately 8:20 a.m.

C. OFFICER PEREZ COERCES A STATEMENT FROM MR. CUNNINGHAM.

Officer Perez interrogated Mr. Cunningham for the next 8 hours. Mr. Cunningham received no breaks, and no food or water during that time. He was not permitted to go to the bathroom. Officer Perez accused Mr. Cunningham of

sexually abusing all of his daughters. When Mr. Cunningham denied the allegation, Officer Perez called him a liar.

For hours, Officer Perez berated Mr. Cunningham, calling him "the scum of the earth." Officer Perez told Mr. Cunningham that if he was a good father, he would confess. Otherwise, his daughters would have to testify in front of a bunch of strangers. He threatened Mr. Cunningham, telling him that he had put people in Walla Walla, the Washington State Penitentiary. "This is your one chance to talk," Officer Perez said, "otherwise you will be guilty for sure." "Confess," he told Mr. Cunningham, "and I can arrange for you to get treatment instead of going to prison."

Mr. Cunningham was especially susceptible to these coercive tactics. He suffered from bipolar disorder, although unlike most such individuals, who feel grandiose and self-assured during manic phases, Mr. Cunningham suffered from dysphoric mania, which causes sadness with enhanced energy. At times, Mr. Cunningham experienced delusions and other symptoms of psychosis.

At the time Officer Perez interrogated Mr. Cunningham, Dr. James Boydstun had been Mr. Cunningham's treating psychiatrist for four years. His chart notes – from long before Mr. Cunningham's interrogation – describe Mr. Cunningham as "sensitive to what others think of him," "sensitive to rejection and criticism," and somebody who attempts to please others "to the nth degree." Dr. Boydstun had prescribed a variety of medications to control Mr. Cunningham's bipolar disorder and related depression, including Lithium, Buspar, Pamelor, Depakote, Lorazepam, Klonopin, Wellbutrin, Xanax, Desyrel, Trazodone, and Nystatin. In the weeks immediately prior

to his arrest, Mr. Cunningham was taking Lorazepam, Klonopin, Depakote, and Wellbutrin. On May 25, 1994, a week *before* Mr. Cunningham was interrogated, Dr. Boydstun wrote in his chart notes that "Henry is acting like he [was] on too much BDZ." BDZ is benzodiazepine, a valium-type sedative that can induce an almost hypnotic state in individuals who exceed the recommended dosage. Before speaking to Officer Perez, Mr. Cunningham had taken several Klonopin tablets, a benzodiazepine type drug, to calm his anxiety about the false allegations against him.

Officer Perez knew Mr. Cunningham was a psychiatric patient. The referral from CPS stated "Henry is under psychiatric care through Chelan Community health because of family problems." Officer Perez admits that Mr. Cunningham told him "I've been under psychiatric care since the late seventies for manic depression" and that he was currently receiving treatment.

The hours of constant browbeating and intimidation at the Wenatchee police station began to wear Mr. Cunningham down. At one point, Mr. Cunningham asked if he could call Dr. Boydstun, his psychiatrist. Officer Perez refused. Mr. Cunningham then asked if he needed a lawyer. Officer Perez told him "It's not like TV. A lawyer won't do you any good." Mr. Cunningham tried to stop responding to questions, but felt compelled to continue.

Officer Perez used his knowledge of Mr. Cunningham's psychiatric condition to manipulate him. Perhaps, Officer Perez suggested to Mr. Cunningham, he had sexually abused his children and didn't remember it? Officer Perez asked leading questions, telling Mr. Cunningham maybe it happened this way or that way. Mr. Cunningham

repeatedly told Officer Perez he had no memory of the things Officer Perez insisted he had done. Officer Perez told Mr. Cunningham that it was common not to remember. He told Mr. Cunningham that he should describe what he imagined might have happened.

Officer Perez eventually typed a statement for Mr. Cunningham to sign. In the statement, Mr. Cunningham falsely "confesses" to sexually abusing all four of his daughters over a period of twenty years. According to the statement, the most recent rape of Mr. Cunningham's daughter Sarah occurred just eight hours before Officer Perez began interrogating Mr. Cunningham. Mr. Cunningham was arrested and taken to jail.

D. OFFICER PEREZ REFUSES TO DOCUMENT EXCULPATORY INTERVIEWS WITH MR. CUNNINGHAM'S CHILDREN.

Later that afternoon, two Wenatchee police officers, Sergeant Terry Pippin and Officer Doug Tangen, went to Mr. Cunningham's home to investigate the allegations. The officers transported two of the alleged victims, Jennifer Cunningham, then 19, and Sarah Cunningham, 17, to the Wenatchee police station, where they were interviewed separately. The officers told the girls their father had just confessed to raping them. Both girls denied any memory of being sexually abused.

The policy of the WPD was to search for physical evidence of sexual assault when it was likely to exist. Despite the allegation that Sarah Cunningham had been raped less than 24 hours earlier, police officers did not collect any physical evidence. They did not collect (or even look at) Sarah's sheets, mattress, underwear or other

clothing, and did not request a rape kit to collect semen and hair samples. (The WPD maintained rape kits at the police station for this purpose.) Neither officer retained any notes or prepared a report documenting their exculpatory interviews.

Three days later, on June 6, 1994, Officer Perez and Child Protective Services social worker Dean Reiman jointly interviewed Jennifer Cunningham for a second time at the WPD station. Officer Perez did not write a report documenting the interview, but Mr. Reiman entered a short description in his log. He states that Jennifer "denied any memory of abuse by her father." Mr. Reiman's notes continue: "det. perez read to her the statements made by her father including a description of intercourse with her that occurred 2 or 3 weeks ago but she still claimed not to remember any specific episodes."[2]

Officer Perez also interviewed Sarah Cunningham that day. Just as when she was interviewed on June 3, she failed to confirm any of the allegations against Mr. Cunningham. Officer Perez similarly failed to create any record of this exculpatory interview with Sarah Cunningham. Mr.

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[2] Officer Perez denies even describing the contents of the statement he obtained from Mr. Cunningham to any of Mr. Cunningham's daughters:

Q: Did you ever show any of the girls what was contained in Mr. Cunningham's statement?

A: No.

Q: You didn't trigger their memories in any way by talking to them about what was in Mr. Cunningham's statement?

A: No.

Reiman was not present at this interview, so there is no contemporaneous record of what actually took place.

E. OFFICER PEREZ COERCES A STATEMENT FROM JESSICA CUNNINGHAM.

On June 9, 1994, Officer Perez and Dean Reiman jointly interviewed 15 year-old Jessica Cunningham at Pinecrest Hospital. Jessica met with Officer Perez and Mr. Reiman in a counselor's office. They told her she could not leave, and that she had to talk with them. Officer Perez immediately told Jessica that her father had "confessed" to sexually abusing her and her sisters.

Officer Perez asked lots of questions about alleged sexual abuse. Jessica responded to his questions by telling him that "nothing had happened" and that she "didn't remember" any abuse. Officer Perez called her a liar. He told Jessica they would confine her in the psychiatric facility until she told them her parents did things to her and her sisters. Jessica did not want to stay at Pinecrest. She considered the hospital "hell."

After "many hours," Jessica gave a rambling, nonsensical "disclosure" claiming to have been hypnotized by Mr. Cunningham and "made to forget." Her father, Jessica reportedly told Officer Perez, would hypnotize all of his daughters by swinging a chain back and forth in front of them or by moving his index finger in front of their faces. He also purportedly taught Jessica "how to do mind control over animals." She claimed that she and her sisters would wake up with bruises, but would not remember how they got them. She might have had blackouts, or, alternatively, she might have had something over her face so she couldn't see anything.

Frustrated by Jessica's vague and ambiguous statements, Mr. Reiman asked Jessica to focus on the most recent episode of alleged abuse. She gave a vague description of sexual intercourse. According to the statement Officer Perez coerced from Mr. Cunningham, the last incident of alleged abuse consisted only of oral sex.

At the conclusion of the interview, Officer Perez tore up his notes. Jessica observed Officer Perez record the interview on a small tape recorder. No audiotape of the interview has ever been produced.

F. OFFICER PEREZ INTERVIEWS JENNIFER AND SARAH CUNNINGHAM FOR THE THIRD TIME.

The day after interviewing Jessica Cunningham at Pinecrest, Officer Perez and Sergeant Pippin executed a search warrant at Mr. Cunningham's office and home. Sarah and Jennifer Cunningham were present for several hours while the home was searched. The two officers concluded the search was unsuccessful: "[Sergeant Pippin] told me that it appeared Henry Cunningham had managed to remove anything incriminating in the few days before he was arrested."[3] Officer Perez then met with Sarah and Jennifer, telling them "that their father, Henry Cunningham, had admitted to many acts of abuse against all four of his daughters and that it was necessary for

[3] Mr. Cunningham only learned of the allegations on or about June 2, 1994, and allegedly "confessed" to raping Sarah at midnight on June 2, just eight hours prior to his interrogation and arrest by Officer Perez. There is no evidence that Mr. Cunningham removed anything from his home during that time.

Sarah and Jennifer to come to the police station to speak with me."

Sarah was interviewed for the third time. This time, she reportedly told Officer Perez fantastic tales of sexual abuse at the hands of both her father and mother, Connie Cunningham. According to the report, she claimed that her father had vaginal and anal intercourse with her from the time she was five years old. She also claimed that her mother often watched as her father sexually abused her, and that her parents had group sex with all of the daughters.

Officer Perez then asked her if any of these acts took place at Mr. Cunningham's office. Sarah reportedly responded that Mr. Cunningham would take her to his office where he would tie her with a rope and have sex with her on the floor of his office and on a table in a large conference room. This happened "quite often."

Officer Perez then interviewed Jennifer Cunningham. According to Officer Perez's report, Jennifer also claimed to have been frequently tied up and raped in Mr. Cunningham's office on a desk and on the conference room table: "It was like we were performing for someone." Jennifer, too, reportedly described episodes of group sex involving all of the daughters and Mr. and Mrs. Cunningham. After Officer Perez's interviews with Jennifer and Sarah, Mrs. Cunningham was arrested.

G. OFFICER PEREZ FAILS TO CONDUCT ANY FURTHER INVESTIGATION.

Officer Perez conducted no further investigation in the case. He did not interview any additional witnesses,

including the daughters' medical providers, to determine whether they had evidence supporting or disproving the allegations. For example, Jan Vetter, a physicians' assistant, saw Sarah Cunningham in December, 1992. Ms. Vetter reported a conversation in which Sarah described her sister Jessica as "a pathological liar," described her father as "slow," and that Sarah "absolutely denie[d] that he has ever sexually or physically abused any of them."

Similarly, had Officer Perez interviewed Dr. Boydstun, Mr. Cunningham's psychiatrist, he would have learned that Mr. Cunningham was impotent as a result of his medications. Also, Dr. Boydstun would have explained that he had met individually with Mr. Cunningham's daughters and had never seen evidence of sexual abuse, and that Sarah Cunningham had called Dr. Boydstun on June 8, 1994, after being questioned twice by police, and told him that "we have not had any memories yet."

Had Officer Perez interviewed Joanne Gust, the custodian at Mr. Cunningham's office, he would have learned that it was impossible for Mr. Cunningham to have conducted frequent "bondage" sessions there without her discovering it. Ms. Gust typically cleaned the office after hours and actually lived with her family in a trailer on the site. She never saw any evidence of sexual abuse. The conference room where the sexual activity allegedly took place did not even have a door.

H. MR. CUNNINGHAM'S PUBLIC DEFENDER DOES NOT PREPARE A DEFENSE.

Wenatchee Public Defender Jeffrey Barker was appointed to represent Mr. Cunningham. Mr. Cunningham told Mr. Barker that the statement Officer Perez had

obtained wasn't true. Mr. Barker did not interview a single witness. On the eve of trial, Mr. Barker called Mr. Cunningham to a meeting in the Chelan County Jail with his wife, Connie Cunningham, and her attorney, Michael Platts. Mr. Barker told Mr. Cunningham that he did not have a chance at trial; with the statement coming in, both he and Connie were sure to be convicted. Connie's only chance was if he pleaded guilty, Mr. Barker said. Mr. Barker told Mr. Cunningham he had to plead guilty, or it would be like he was putting his wife in prison himself. Finally, Mr. Cunningham agreed to plead guilty – not because he thought he was guilty, but because he felt he had no choice. Mr. Cunningham's plea was entered on August 15, 1994. He later received an exceptional sentence of over 47 years in prison.

Connie Cunningham went to trial in October, 1994. At their mother's criminal trial, Sarah described her memories of abuse as incomplete. Her memories would "come and go," she testified, because some days she repressed them more than others. Jennifer testified that she had only fractions of memories, and did not have a complete memory of any episode of abuse. Despite the fact that the statement Officer Perez obtained from Mr. Cunningham did not incriminate Connie Cunningham in any way, it was read to the jury a number of times, and Mrs. Cunningham was convicted. *State v. Connie J.C.*, 937 P.2d 1116, 1118 (1997).

Connie Cunningham's conviction was overturned because the trial court had improperly admitted Mr. Cunningham's so-called confession as a public record. *Id.* at 1118. The Court of Appeals noted that the testimony by the Cunningham daughters was "fragmented," and that there were questions regarding the reliability of the

statement Officer Perez obtained from Mr. Cunningham. *Id.* at 1119. ("We note, however, that Mr. C[unningham] suffers from bipolar disorder. That disorder might well raise concerns about the trustworthiness of his confession.") The state decided not to re-try Mrs. Cunningham.

In November 1998, Mr. Cunningham's pro bono attorneys filed a Personal Restraint Petition in the Washington Court of Appeals seeking to overturn his convictions. In late February, 1999, the State conceded that Mr. Cunningham's conviction was obtained in violation of his right to effective assistance of counsel. On March 4, 1999, the Court of Appeals vacated Mr. Cunningham's conviction and ordered that he be immediately released from prison. The Chelan County Prosecuting Attorney decided that a new trial was unlikely to result in a conviction. Ultimately, all charges against Mr. Cunningham were dismissed with prejudice.

This action followed.

VIII. ARGUMENT

The Court of Appeals decision in this matter fails to strike the proper balance between our legitimate zeal to protect children from sexual abuse and the manifest need to ensure that citizens are subjected to criminal prosecution only based on reliable evidence untainted by suggestion. By holding that the Constitution places no limits on the interview tactics investigators may employ except the requirement that they refrain from deliberately fabricating evidence, the Court of Appeals allows government investigators free reign to threaten, browbeat and intimidate young children so long as the investigator believes the parent is guilty. This Court should grant the writ in

this case in order to harmonize the rulings among the various courts of appeal and establish a due process standard that allows investigators substantial leeway to conduct interviews according to the needs of a particular case, but that nevertheless prohibits the abusive and suggestive interview tactics employed in this case.[4]

Additionally, the Court of Appeals in this case applied *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) to require that Mr. Cunningham demonstrate "bad faith" in order to make out a claim against Officer Perez for failure to document or preserve his exculpatory interviews. While Mr. Cunningham believes he did provide evidence sufficient for a jury to find "bad faith," this Court should grant the writ in order to establish a different standard where, as here, government officials create the evidence rather than simply failing to collect or preserve it.

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[4] Mr. Cunningham argued at the Court of Appeals and still contends that he satisfied the stringent "deliberate fabrication" test. See n. 7, *infra*. Before this Court, Mr. Cunningham respectfully suggests a different standard is appropriate. This Court permits parties to make different or additional arguments as long as they relate to the same claim. *Lebron v. National R.R. Corp.*, 513 U.S. 374, 379 (1995) ("[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not bound to the precise arguments they made below.")

A. THIS COURT SHOULD ESTABLISH A STANDARD FOR INTERVIEWS IN CHILD SEX ABUSE CASES THAT ALLOWS INTERVIEWERS SUBSTANTIAL LEEWAY WHILE STILL PROTECTING THE RIGHTS OF THE ACCUSED.

The trial court in this case concluded that Officer Perez was not entitled to qualified immunity. In reversing that decision, the Court of Appeals analyzed the case according to a framework it first proposed in *Devereaux v. Abbey*, 263 F.3d 1070, 1075-76 (9th Cir. 2001) (en banc). Like the instant case, *Devereaux* is a product of the "Wenatchee Witch Hunt" prosecutions. The plaintiff in *Devereaux* filed a § 1983 action against Robert Perez and others claiming he was subjected to criminal prosecution for child sexual abuse based on allegations obtained by improper and coercive child interviews.

The *Devereaux* court determined that there is no constitutional right to have children interviewed in a particular manner in a child sex abuse investigation. 263 F.3d at 1075 (citing *Myers v. Morris*, 810 F.2d 1437, 1460-61 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987)).[5] Instead,

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[5] *Myers* had its origins in a botched child sexual abuse investigation in Jordon, Minnesota in 1983-84. Twenty-four people were accused: one pled guilty, two were acquitted, and the charges were dismissed against twenty-one others. The Minnesota Attorney General's Report on Scott County Investigations found that repeated child interviews seriously undermined the reliability of any subsequent testimony, and found that there was a widespread lack of documentation of the interviews. The Report also condemned the 'cross-germination' effect that occurred when the authorities informed interviewees of allegations made by others and conducted joint interviews. The Report concluded that no evidence existed for the majority of the accusations and that the careless manner of the investigation not only ruined the prospects for

(Continued on following page)

the court analogized the case to *Pyle v. Kansas*, 317 U.S. 213 (1942), which held that the knowing use of perjured testimony to secure a criminal conviction violates the Constitution, and concluded the right at issue was the right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government. *Id.* Applying this standard to the case before it, the *Devereaux* court decided the plaintiff had to show: (1) the defendants continued their investigation of Mr. Devereaux despite the fact they knew or should have known he was innocent; or (2) the defendants used interview techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false evidence. *Id.* at 1076. The majority of the Ninth Circuit, over a strong dissent by Justice Kleinfeld, concluded that Mr. Devereaux had failed to make that showing.

In this case, the Ninth Circuit applied the same "deliberate fabrication of the evidence" standard employed in *Devereaux v. Abbey*. Appendix 14. This standard is too high. By creating a special class of witnesses with whom government officials may employ coercive interview practices with impunity as long as they believe the suspect

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the successful prosecution of any valid cases, but may have 'created' invalid cases as well. See, generally, Thomas C. Feher, *The Alleged Molestation Victim, the Rules of Evidence, and the Constitution; Should Children Really Be Seen And Not Heard?*, 14 Am. J. Crim. L. 227, 239-240 (Spring 1987). In the years since the *Myers* court determined there were no clearly established legal norms for the forensic interviews of children, 810 F.2d at 1460-61, a large body of highly consistent scientific literature has developed to inform the court of various aspects of children's testimony. Stephen Ceci and Maggie Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony* 299 (1995).

is guilty, the Court of Appeals decision conflicts with cases from other circuits holding that the due process clause guarantees the right not to be subjected to criminal prosecution based on coerced and unreliable evidence. Furthermore, this standard does not sufficiently protect either the interests of the child witness or the accused person. Instead, this Court should apply the standard used when police employ pre-trial identification line-ups. This standard gives investigators substantial leeway, but shifts the focus from the investigator's subjective beliefs about the suspect to the reliability of the statements obtained.

1. The Ninth Circuit's Decision Conflicts with Decisions in Other Circuits.

By creating a class of witnesses with whom government investigators may employ coercive practices so long as the investigator believes the suspect is guilty, the Ninth Circuit decision in this case conflicts with decisions in other Circuits holding that the Due Process clause is violated whenever police use a statement coerced from a witness in a criminal prosecution. In *Clanton v. Cooper*, 129 F.3d 1147, 1157-58 (10th Cir. 1997), the Tenth Circuit held that where a constitutional violation has rendered evidence unreliable, its use may be challenged by anyone against whom the evidence is used. Thus, in *Clanton*, a woman arrested for arson but never charged had standing to claim that a fire marshal coerced a witness into making a statement against her. *Id.* The touchstone of the fire marshal's liability was not his belief about the guilt of the accused nor his knowledge of the falsity of the statement. Instead, the Tenth Circuit focused on the interrogation itself: did the fire marshal use interrogation tactics that overcame the free will of the witness? *Id.* at 1158.

Similarly, in *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (1994), *cert. denied*, 513 U.S. 1085 (1995), the Seventh Circuit decided that using a statement coerced from a witness violates the Due Process clause, although a prosecutor may have absolute immunity for its use at trial.

Indeed, at least one Court of Appeals has commented that using coercive child interview techniques violates the Due Process clause when the results of those interviews are used in pre-trial proceedings. In *Michaels v. New Jersey*, 222 F.3d 118 (3d Cir. 2000), *cert. denied*, 531 U.S. 118 (2001), day care worker Kelly Michaels brought suit against New Jersey prosecutors after her convictions on 115 counts of child sexual abuse were reversed by the New Jersey Supreme Court. The New Jersey Court ordered a hearing to evaluate whether the children's testimony in the case was impermissibly tainted by coercive interview techniques. *Id.* at 120. Like Mr. Cunningham's case, which the state ultimately chose not to pursue (though only after Mr. Cunningham spent five years in prison for crimes he did not commit), Ms. Michael's case was dropped by prosecutors before the reliability of the statements obtained from the children could be probed at a hearing. 222 F.3d at 120. In the subsequent § 1983 action, the Third Circuit, following *Buckley v. Fitzsimmons*, held that the prosecutors were absolutely immune for their use of the tainted testimony at trial. *Id.* at 122.

The *Michaels* court went on to distinguish *Clanton v. Cooper*. It noted the principal differences between the two cases were the nature of the defendants and the use of the tainted statements. 222 F.3d at 122-23. In *Buckley,* the Third Circuit pointed out, the defendants were prosecutors who used the tainted statements at trial. *Id.* In contrast, the defendant in *Clanton* was a law enforcement officer,

unprotected by absolute immunity, who used the improperly obtained statement to obtain an arrest warrant and not at trial. *Id.* It is apparent that the Third Circuit would have followed *Clanton v. Cooper* and recognized a due process violation in the use of the improperly obtained statements had they been obtained and used by a law enforcement officer rather than a prosecutor. This, of course, is exactly the claim Mr. Cunningham is asserting in this case.

2. The Ninth Circuit's Decision Does Not Sufficiently Protect Child Witnesses or the Accused from Coercive Interview Practices.

By allowing the use of coercive child interview practices as long as the investigator believes the suspect is guilty, the Ninth Circuit decision allows investigators to obtain statements through the browbeating and intimidation of children. Such coercive tactics have been termed "secondary abuse" of the very children investigators are seeking to protect. In an amicus brief signed by 45 prominent social science researchers in the *Michaels* case, Stephen Ceci wrote, albeit about younger children than those involved in this case:

> The authors of this brief also wish to convey their deep concern over the children in this case. Our concern is that if there were incidents of sexual abuse, the faulty interviewing procedures make it impossible to ever know who the perpetrators were and how the abuse occurred. . . . But we have further concerns. And these involve the interview techniques which we view as abusive in themselves. After reading a number of these interviews, it is difficult to believe that adults charged with the care and protection of young

> children would be allowed to use the vocabulary that they used in these interviews, and that they would be allowed to interact with the children in such sexually explicit ways, or that they would be allowed to bully and frighten their child witnesses in such a shocking manner . . . Above and beyond the great stress, intimidation and embarrassment that many of the children so obviously suffered in many of the interviews, we are deeply concerned about the long-lasting harmful effects of persuading children they have been horribly sexually and physically abused, when in fact there may have been no abuse until the interviews began.

Stephen J. Ceci and Maggie Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony* 292-93 (1995).

In addition to the harm to the children such unfettered use of coercive interview practices causes, the resulting statements are of dubious reliability. The empirical literature clearly reflects a concern that coercive interview practices can be highly suggestive. Stephen Ceci and Maggie Bruck collected many of the studies in their seminal book *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, published in 1995. Ceci and Bruck note that many of the techniques used by Officer Perez in this case – including repeated interviews, leading questions, biased interviewer and interviewer threats – can render a child's statement unreliable.

The Ninth Circuit decision does not acknowledge this. Indeed, the Ninth Circuit seems to believe such tactics are necessary to push past "denial." The Ninth Circuit stated, without any citation to the record or any scientific literature, that "[i]t is common for sex abuse victims to suppress

memories of the assault or deny that it happened." Appendix 15. In fact, the opposite is true:

> These data dispel the belief that children need to be bombarded with suggestive techniques in order to elicit details of their traumatic events; in fact, children can provide detailed information through open-ended prompts, and if a child denies abuse when asked directly, there is no scientifically compelling evidence that the child is "in denial." Abused children usually disclose when directly asked.

Maggie Bruck and Stephen J. Ceci, *Forensic Developmental Psychology: Unveiling Four Scientific Misconceptions*, Current Directions in Psychological Science (Spring 2004) (in press).

The reliability problems of allegations obtained in this fashion were well known at the time of Officer Perez's investigation. One commentator in 1988 noted that using repeated interviews, narrowly focused interviews, incomplete interviews (where the interview is halted once an allegation is obtained), and interviewer threats can create "false memories" of abuse where no abuse occurred. Thomas L. Feher, *The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?*, 14 Am. J. Crim. L. 227, 237-38 (1988) [hereinafter "Feher"] ("The most significant problem may be that the interviewer is unaware that a false memory is being created in the child. The interviewer is most likely trying to get the child to admit what the interviewer thinks is "the truth" in order to protect the child's best interest.").

Of particular concern to the granting of the writ in this case is the likelihood that the corruption of the child's

statement occurs not as part of a deliberate attempt to falsify evidence, but rather that it typically occurs when the interviewer is already convinced of the suspect's guilt. See Feher *supra* at 237-38; see also John R. Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews,* 62 Wash. L. Rev. 705, 710 (1987) ("There is a danger that an interviewer with a preconceived idea of what has happened may *unwittingly* impose this idea on the child . . .") (emphasis added). Under the test devised by the Ninth Circuit, such conduct is not only insulated from constitutional review, but actually encouraged. The Ninth Circuit approach is backward, because it invites state officials to first form opinions about a suspect's guilt, and then develop the evidence to support it. This is exactly the kind of "interviewer bias" most likely to lead to false allegations.

The failure of the approach used by the Ninth Circuit in this case can be seen in the continuing frequency of the use of coercive interview practices. In a study conducted for the Washington State Public Institute in 2001, Lucy Berliner and Roxanne Lieb found that 20% of the questions asked by professional interviewers were "suggestive of abuse" and that "[o]nly about half of the interviews began with open-ended invitations to provide information." Lucy Berliner & Roxanne Lieb, *Child Sex Abuse Investigations: Testing Documentation Methods* at 18-19 (2001).

3. This Court Should Instead Apply the Standard Governing Pretrial Identification Procedures to Determine Whether Child Interview Practices Comport With Due Process.

This Court has developed a substantial body of law governing due process limits on the use of suggestive

pre-trial identification procedures. In *Stovall v. Denno*, 388 U.S. 293 (1967) and *Manson v. Brathwaite*, 432 U.S. 98 (1977), this Court established that the "central question" governing the use of pretrial identification procedures was "whether under the totality of the circumstances the identification was reliable." *Manson*, 432 U.S. at 106. In *Neil v. Biggers*, 409 U.S. 188, 198 (1972) the Court elaborated on the application of the Due Process clause to identification procedures, noting "it is the likelihood of misidentification which violates a defendant's right to due process . . . suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." Whether a line-up was unnecessarily suggestive depends on the totality of the circumstances, and the *Biggers* court set out five factors for review: (1) the opportunity for the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Id.* at 199.

A number of courts and commentators have suggested that the identification due process paradigm could be applied to child interviews with little modification. Perhaps the first judge to make the connection was Judge Lay of the Eighth Circuit, who, while sitting by designation on the Ninth Circuit, authored the decision at issue in this Petition. In his dissent in *US v. Spotted War Bonnet*, Judge Lay analogized coercive child interviews to suggestive pretrial identification procedures – and even applied the *Biggers* factors to his review of the child interviews in

that case. 882 F.2d 1360, 1372 (8th Cir. 1989), *cert. granted, judgment vacated*, 497 U.S. 1021 (1990), *aff'd on other grounds*, 933 F.2d 1471 (8th Cir. 1991), *cert. denied*, 502 U.S. 1101 (1992). Additionally, the New Jersey Supreme Court in *State v. Michaels* noted "[t]he law governing the admissibility of eyewitness identification testimony provides a helpful perspective in addressing the concerns at issue here . . . Like the investigatory interview in a child sexual-abuse case, a pretrial identification procedure can be a critical moment in the course of a criminal prosecution." 642 A.2d 1372, 1382 (N.J. 1994). The court further stated that "the effects of an initially suggestive identification, like those of a coercive or suggestive interrogation, are likely to remain corrosive over time; that is 'once the witness has picked out the accused . . . he is not likely to go back on his word later.'" *Id.* at 1382 (citing *U.S. v. Wade*, 388 U.S. 218, 229 (1967).) Commentators as well have noted that the Court's pretrial identification jurisprudence could be applied to suggestive child interviews:

> Child witnesses are highly susceptible to suggestion and often undergo severely suggestive interviews. It is hard to imagine that the testimony of such a person could ever bear enough indicia of reliability as to not violate due process . . . Further there seems to be no basis for limiting the use of these standards to cases where the witness's testimony consists of an identification. *Wade* and its progeny have provided guidance for the admissibility determination to other types of testimony, and their logical congruence to the situation at hand is too compelling to be ignored.

Feher, 14 Am. J. Crim. Law at 251; see also Clifton M. Duggas, *State of New Jersey v. Michaels: The Due Process*

Implications Raised in Interviewing Child Witnesses, 55 La. L. Rev. 1205 (1995).

B. THIS COURT SHOULD REQUIRE POLICE OFFICERS TO ADEQUATELY DOCUMENT CHILD SEX ABUSE INTERVIEWS.

Even if this Court were to conclude that there are no constitutional limits placed on government officials conducting child sex abuse interviews, there would still be a constitutional violation in this case. Just as significant as Officer Perez's coercive interviews was his refusal to document his exculpatory interviews, and the omission of his coercive tactics from his police reports in the interviews that he did document.[6] The Ninth Circuit, applying *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988), held that Mr. Cunningham had failed to present evidence of "bad faith" since "Perez likely believed his [interview] tactics were lawful."[7] Appendix 16. Like the Ninth Circuit's

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[6] The failure to properly document child interviews was one of the hallmarks of the "Witch Hunt" prosecutions. Vicki Wallen, *et al.*, *1998 Review of the Wenatchee Child Sexual Abuse Investigations*, State of Washington Office of the Family & Children's Ombudsman at 19-20 (finding that interviewers did "not document interviews in a format that indicated exactly which questions were asked, in what order, and what exact answers were given to the questions, often did not indicate who asked the questions and in some cases documentation was missing altogether.")

[7] The Ninth Circuit opinion fails to mention that Officer Perez lied in court about the conduct of his interviews, indicating that he knew his tactics were improper. See n. 2, *supra*. Nor does the opinion address the report of Robert Keppel, Mr. Cunningham's police practices expert, who stated that reading the statement one is trying to confirm to a witness is "deliberate misconduct." Nor does the opinion mention Officer Perez's

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application of the "deliberate fabrication" standard to the conduct of the child interviews, the use of *Youngblood's* "bad faith" standard fails to offer sufficient protections to the accused where, as here, the State is actually creating the evidence.

In *California v. Trombetta*, 467 U.S. 479 (1984), this Court considered a claim that California authorities violated the Due Process clause when they failed to preserve a breath sample they took in a drunk driving case. The Court applied a three-part test: (1) whether the evidence is highly material to the defense; (2) whether the defense value of the evidence was apparent before it was destroyed; and (3) whether the accused could obtain comparable evidence by other reasonably available means. 467 U.S. at 488-89.

Four years later, in *Arizona v. Youngblood*, this Court found no due process violation where police officers failed to perform chemical tests on samples gathered in a sexual assault kit, and failed to refrigerate the victim's clothes so that other tests might be run. 488 U.S. 51, 58 (1988). The *Youngblood* opinion is careful to distinguish rather than overrule *Trombetta*:

> The Due Process Clause of the 14th Amendment, as interpreted in *Brady*, makes the good faith or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory information. But we think the Due Process Clause requires a different result when

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violation of WPD policy in failing to collect obvious physical evidence or request a rape kit.

> we deal with the failure of the State to preserve evidentiary material of which no more can be said than it could have been subjected to tests . . .

488 U.S. at 57.

The Court of Appeals decision in the instant case fails because it applies the *Youngblood* "bad faith" test rather than the *Trombetta* three-part test to Officer Perez's failure to document his forensic child interviews. While *Youngblood* applies to state officials' failure to collect evidence at a crime scene, *Trombetta* is a better fit for situations where the state is creating the evidence, as it is when state officials conduct forensic child abuse interviews. Lucy S. McGough, *Good Enough for Government Work: The Constitutional Duty to Preserve Forensic Interviews of Child Victims*, Law & Contemp. Probs. 179, 203-05 (Winter 2002). *Trombetta* shifts the analysis from the subjective mental state of the officer to where it should be: the impact on the accused's right to fair trial. This underlines why twenty-one states now use something other than *Youngblood's* pure bad faith analysis in assessing claims under their state constitutions.[8]

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[8] See *Grimsley v. State*, 678 So. 2d 1197, 1203-05 (Ala. Crim. App. 1996); *Thorne v. Department of Pub. Safety*, 774 P.2d 1326, 1331 (Alaska 1989); *People v. Eagen*, 892 P.2d 426, 428-29 (Colo. Ct. App. 1994); *State v. Morales*, 657 A.2d 585, 589 (Conn. 1995); *State v. Blackwell*, 537 S.E.2d 457, 462 (Ga. Ct. App. 2000); *State v. Matafeo*, 787 P.2d 671, 673 (Haw. 1990); *State v. Fain*, 774 P.2d 252, 257-66 (Idaho 1989); *Commonwealth v. Henderson*, 582 N.E.2d 496, 497 (Mass. 1991); *Jones v. State*, 761 So. 2d 907, 909-10 (Miss. Ct. App. 2000); *State v. Brown*, 982 P.2d 468, 472-73 (Mont. 1999); *Cook v. State*, 953 P.2d 712, 714-16 (Nev. 1998); *State v. Smagula*, 578 A.2d 1215 (N.H. 1990);

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Applying the three part *Trombetta* test to the instant case demonstrates that Officer Perez's failure to document his interviews does violate the Due Process Clause. First, forensic interviews are always highly material to the defense, as they may comprise the only evidence against the accused. In *Trombetta*, the court noted that evidence of the testing process's accuracy could substitute for testing the sample itself. 467 U.S. at 489. In contrast, the likelihood of interviewer error is well established. See, e.g., Michael Lamb, et al., *Accuracy of Investigators' Verbatim Notes of Their Forensic Interviews with Alleged Child Abuse Victims*, 24 Law & Hum. Behav. 699 (2000) (noting that important content is often omitted from notes and verbatim information is typically lost). Second, the defense value of such information is apparent, especially where, as here, the officer deliberately covers up his use of improper interview tactics. See n. 4, *supra*. Finally, the early interviews cannot be replicated. At the initial interview, the child's memory is likely to be at its height, unpolluted. Without a verbatim record, there is no way to test the validity of the claim that the forensic interview of the child was neutrally conducted and accurately recalled.

State v. Joncas, 554 A.2d 841, 843 (N.H. 1989); *State v. Montijo*, 727 A.2d 533, 533-38 (N.J. 1998); *State v. Chouinard*, 634 P.2d 680 (N.M. 1981), *cert. denied*, 456 U.S. 930 (1982), cited with approval by *State v. Ware*, 881 P.2d 679, 682 (N.M. 1994); *State v. McCoy*, 998 P.2d 709, 714 (Or. Ct. App. 2000); *Childs v. State*, 988 P.2d 898, 901 (Okla. 1999); *State v. Campbell*, 691 A.2d 564, 569-70 (R.I. 1997); *State v. Mabe*, 412 S.E.2d 386, 388-89 (S.C. 1991); *State v. Delisle*, 648 A.2d 632, 642-43 (Vt. 1994); *State v. Paynter*, 526 S.E.2d 43, 54 (W. Va. 1999); *Young v. State*, 849 P.2d 754, 764-65 (Wyo. 1993).

IX. CONCLUSION

Children are in grave need of protection from sexual abuse. At the same time, this case and others like it make clear that some limits must be placed on the tactics that may be employed by investigators in such cases. The need to protect children from sexual abuse cannot allow courts to ignore or diminish the constitutional rights of any person.

Respectfully submitted,

GLENN S. DRAPER
MICHAEL PIERSON
ROBERT HELLER (*Counsel of Record*)
Attorneys for Plaintiff

345 F.3d 802

United States Court of Appeals,
Ninth Circuit.

Henry H. **CUNNINGHAM**, Plaintiff-Appellee,

v.

CITY OF **WENATCHEE**, Defendant,

and

Robert R. **Perez**, Defendant-Appellant.

No. 02-35792.

Argued and Submitted June 2, 2003.
Filed Oct. 3, 2003.

Patrick McMahon, Carlson, McMahon & Sealby, **Wenatchee**, Washington, for the defendant-appellant.

Michael Pierson, Riddell Williams, Seattle, Washington; Glenn S. Draper, Seattle, Washington, for the plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of Washington; Wm. Fremming Nielsen, Chief District Judge, Presiding, John C. Coughenour, District Judge, Presiding. D.C. Nos. CV-01-00058-WFN, CV-00-01640-JCC.

Before: LAY,* FERGUSON, and GOULD, Circuit Judges.

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* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

OPINION

LAY, Circuit Judge.

Henry **Cunningham** brought suit in federal district court alleging Robert **Perez**, a police officer with the City of **Wenatchee**, Washington, and other government officials, violated his civil rights during a sex abuse investigation.[1] The district court denied **Perez's** motion for summary judgment based on qualified immunity. This appeal followed, and we reverse.

I. *Background*

Cunningham lived in **Wenatchee** with his wife, Connie, and three of his four children, Jennifer, Sarah, and Jessica. In May 1994, **Cunningham's** youngest daughter, Jessica, experienced behavioral and drug problems, which led to her stay at Pinecrest Hospital. While receiving treatment, Jessica claimed her father sexually abused her. After hearing Jessica's claim, a Pinecrest employee contacted Child Protective Services (CPS) in **Wenatchee**. CPS notified the **Wenatchee** Police Department of Jessica's disclosures.

After **Cunningham** learned about his daughter's claims, he went to the **Wenatchee** Police Department. Detective **Perez** gave **Cunningham** his Miranda rights, and **Cunningham** signed a valid waiver of those rights. **Perez** then interrogated him. **Cunningham** initially

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[1] A factual recounting of the various sexual abuse charges in the City of **Wenatchee** is summarized in this court's decision in *Devereaux v. Abbey*, 263 F.3d 1070 (9th Cir.2001) (en banc).

claimed he did not sexually abuse Jessica. **Perez** called **Cunningham** a liar and said he knew that **Cunningham** committed the offense. **Perez** told **Cunningham** that his daughters would be forced to testify if he refused to confess.

Cunningham, who was taking medication for a bipolar disorder, asked to call his therapist, but **Perez** denied the request. **Perez** told **Cunningham** that he had put people in the Washington State Penitentiary, but that **Cunningham** could receive treatment instead of serving time in prison if he confessed. The interrogation lasted for eight hours. **Cunningham** did not request a break for food or water. **Perez**, at times, raised his voice, but never yelled or used physical violence. At the end of the interrogation, **Cunningham** signed a confession admitting to abusing all of his daughters. **Perez** arrested **Cunningham**.

After the arrest, **Perez** interviewed Jennifer and Sarah. Both failed to confirm their father's alleged abuse. **Perez** also interviewed Mrs. **Cunningham**, who proclaimed her husband's innocence. **Perez** did not create a record of these interviews. **Perez** then interviewed Jessica at Pinecrest. She denied being abused by her father. **Perez** continued to question her and allegedly told her that she would have to stay at Pinecrest until she disclosed her father's abuse. After a number of hours, Jessica recounted incidents of abuse. **Perez** then revisited Sarah and Jennifer. Both daughters admitted to being abused by their father and gave **Perez** a detailed statement. **Perez** conducted no additional interviews.

Cunningham pled guilty to sexually abusing his daughters. After serving five years in prison, the Washington

Court of Appeals vacated his conviction, and the Chelan County Prosecutor dropped all charges. **Cunningham** then filed a civil rights action under 42 U.S.C. § 1983 against **Perez**, the City of **Wenatchee**, and various other state officials who investigated his alleged crimes. He claimed the City and its officials violated his right to be free from self-incrimination, arrested him without probable cause, fabricated the evidence, and concealed exculpatory evidence. **Perez** filed a motion for summary judgment based on qualified immunity, which the district court denied. **Perez** now appeals.

II. *Jurisdiction*

We first address whether we have jurisdiction over Perez's interlocutory appeal. The Supreme Court's decisions in *Behrens v. Pelletier,* 516 U.S. 299, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996), and *Johnson v. Jones,* 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), guide our analysis. In *Johnson,* the plaintiff brought suit against police officers for using excessive force during an arrest. The district court denied the officers' motions for summary judgment based on qualified immunity because the pretrial record contained sufficient evidence to show a genuine issue of fact for trial. *Johnson,* 515 U.S. at 308, 115 S.Ct. 2151. The officers immediately appealed the ruling, arguing that the record contained no evidence showing they had assaulted the plaintiff. *Id.* The Seventh Circuit dismissed the appeal for lack of jurisdiction. The Supreme Court affirmed. It held the officers could not bring their interlocutory appeal because the only question before the court of appeals was whether the record was sufficient to show the officers assaulted the plaintiff. *Id.* at 307, 115 S.Ct. 2151. Interlocutory appeals are not available when

the appellate court is required to resolve a "*fact*-related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial." *Id.* The officials must present the appellate court with a legal issue that does not require the court to "consider the correctness of the plaintiff's version of the facts . . . ." *Id.* at 312, 115 S.Ct. 2151 (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 528, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)).

In *Behrens,* the Court faced another interlocutory appeal from the denial of qualified immunity.[2] The Court noted that the rule in *Johnson* does not bar all interlocutory appeals from the denial of qualified immunity simply because the district court found a disputed issue of material fact. *Behrens,* 516 U.S. at 313, 116 S.Ct. 834. The Court stated an appellate court could exercise jurisdiction over a district court order that determined 1) material facts were in dispute, *and* 2) the defendant's alleged conduct violated clearly established law. *Id.* Such an order contrasts with the district court's order in *Johnson,* which determined only the question of sufficiency of the evidence to support the merits of plaintiff's claim. However, the

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[2] The primary issue in *Behrens* was whether the defendant could appeal the denial of his summary judgment motion based on qualified immunity after he had already appealed the denial of his motion to dismiss. *Behrens,* 516 U.S. at 301, 116 S.Ct. 834. The Court ultimately held the defendant could bring his second interlocutory appeal. *Id.* at 311, 116 S.Ct. 834. This holding is not applicable to the present case because this is **Perez's** first interlocutory appeal. The importance of *Behrens* lies in the third section of the opinion, which determined whether the court of appeals could exercise jurisdiction over the defendant's interlocutory appeal even though the district court found a dispute of material fact.

district court in *Behrens* determined that the defendant's conduct violated clearly established law, the officials could bring an interlocutory appeal. *Id.* On appeal, the court of appeals was instructed that it must resolve any factual disputes in favor of the plaintiff and decide the legal question as to whether the official's alleged conduct violated clearly established law. *Id.*[3]

From *Behrens,* our cases have distilled the following rule for interlocutory appeals from the denial of qualified immunity: We do not have jurisdiction over interlocutory appeals from district court orders that decide only whether there exists sufficient evidence to sustain the material facts shown by the plaintiff. However, we are instructed that we do have jurisdiction from district court orders that decide not only that material facts are in dispute, but also that the defendant's alleged conduct violated the plaintiff's clearly established constitutional rights. When exercising jurisdiction over the latter type of order, we resolve all factual disputes in favor of the plaintiff and look

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[3] The *Behrens* Court ultimately remanded the case back to the court of appeals because the trial court failed to delineate which claims were or were not sufficiently supported with admissible evidence. The Court stated:

> [W]hile the District Court, in denying petitioner's summary judgment motion, did not identify the particular charged conduct that it deemed adequately supported, *Johnson* recognizes that under such circumstances "a court of appeal may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed."

Id. at 313, 115 S.Ct. 2151 (quoting *Johnson,* 515 U.S. at 319, 115 S.Ct. 2151).

at the purely legal question of whether the defendant's alleged conduct violated the plaintiff's clearly established constitutional rights. *See, e.g., Bingham v. City of Manhattan Beach,* 329 F.3d 723, 725 (9th Cir. 2003) (noting when facts are disputed, the court must assume the non-moving party's facts are correct); *Jeffers v. Gomez,* 267 F.3d 895, 903 (9th Cir. 2001) (exercising jurisdiction over the defendant's interlocutory appeal by crediting all of the plaintiff's facts, leaving only the legal issue to decide); *Schwenk v. Hartford,* 204 F.3d 1187, 1195 (9th Cir. 2000) (noting that "we assume the version of the material facts asserted by the non-moving party to be correct" when determining whether the alleged conduct violates clearly established law); *Knox v. Southwest Airlines,* 124 F.3d 1103, 1107 (9th Cir. 1997) (exercising jurisdiction even though the district court found disputed issues of material fact).

In the present case, the district court ruled that **Perez** was not entitled to qualified immunity because "there is enough doubt to find that a reasonable state official would not have believed **[Perez's]** conduct was lawful." The district court made no specific reference to the sufficiency of the evidence or to any dispute of material fact. The district court determined only whether **Perez's** conduct violated clearly established law. This determination is a legal ruling. *See Armendariz v. Penman,* 75 F.3d 1311, 1317 (9th Cir. 1996) (en banc). This court has jurisdiction to review a district court's decision that a defendant's alleged conduct violated clearly established law. *Id. See also Knox,* 124 F.3d at 1107 (exercising jurisdiction to determine "whether a reasonable officer would know that his or her alleged conduct violated clearly established law").

To better understand appellate jurisdiction on an interlocutory appeal involving the defense of qualified immunity, we must examine the underlying principles behind interlocutory appeals from the denial of qualified immunity, which were first set forth in *Mitchell,* and revisited in *Johnson* and *Behrens.* As *Johnson* pointed out, various courts of appeals have held different views about the immediate appealability of the claims of public officials who assert qualified immunity defenses. Notwithstanding the decisions of *Johnson* and *Behrens,* the courts still seem to be in somewhat disarray as to the proper rules to follow. Our job as an appellate court is not to critique the Supreme Court decisions, but to do our best to interpret them. We note that in *Mitchell,* the Court relies upon the relevant statute granting appellate courts jurisdiction to hear appeals only from "final decisions" of district courts. *See* 28 U.S.C. § 1291. The Court in *Mitchell* finds that a district court's order denying a defendant's motion for summary judgment on the basis of qualified immunity was an immediately appealable "collateral order" under *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Such collateral orders are said to fall within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546, 69 S.Ct. 1221. In reviewing summary judgments relating to the defense of qualified immunity, we particularly note that this class of cases would be effectively unreviewable on appeal from a final judgment. This is because the defense of qualified immunity relates not only to immunity from liability, but more importantly from also standing trial. Thus, it is fundamental that

in a defense of qualified immunity in order to have the public official relieved from time-consuming pretrial procedures and trial itself, it is important to resolve this issue at an early stage of the litigation.

A fundamental tenet of the collateral order doctrine is that the claim of immunity is conceptually distinct from the merits of the plaintiff's claims. *Mitchell* also provides direction that we need not consider the correctness of the plaintiff's version of the facts or even if the plaintiff's allegations actually state a claim. The legal issue over which the appellate court has jurisdiction is "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions . . . [and] whether the law clearly prescribed the actions the defendant claims he took." *Mitchell,* 472 U.S. at 528, 105 S.Ct. 2806. The confusion arises from the language in *Johnson* that where the summary judgment order determines only a question of evidentiary sufficiency then this order, even though entered in a qualified immunity case, is not appealable. In understanding this admonition, it is important to consider the facts of *Johnson* wherein the defendants, who allegedly used excessive force during an investigation, denied they beat the plaintiff and denied they were even present at the time of the beatings. Discovery had taken place in *Johnson* and the district court denied the motion for summary judgment on the ground that there was sufficient circumstantial evidence supporting the plaintiff's theory of the case. In affirming the Seventh Circuit's finding that the appeal lacked jurisdiction, the Supreme Court held that the case lacked separability as to the legal question of qualified immunity and held that the case did not present an abstract issue of law. Thus, where the case involves the sufficiency of the evidence of

plaintiff's proof, the mere fact that a defense of qualified immunity is also included does not in itself provide a jurisdictional basis of appeal.

In the subsequent case of *Behrens,* the Court pointed out that once the case reaches the summary judgment stage, the plaintiff can no longer rest on its pleadings under Federal Rule of Civil Procedure 56 and that the court must look to the evidence before it as to whether or not the legal issue can be separated from the merits of plaintiff's claim in resolving the question of qualified immunity. In *Behrens,* the Court pointed out that the defense of qualified immunity can be raised at successive stages of the district court's proceeding. The Court observed:

> Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

Behrens, 516 U.S. at 306, 116 S.Ct. 834 (quoting *Mitchell,* 472 U.S. at 526, 105 S.Ct. 2806).

We hold in the present case the facts involved are distinguishable from those in *Johnson.* In following the admonition in *Mitchell,* we assume the facts shown by **Cunningham**, the nonmoving party, as being true for the purpose of deciding the abstract legal question governing qualified immunity. We also find that the allegations made

by **Cunningham** and the proof adduced by him in the summary judgment proceeding sets apart the legal issue of qualified immunity from the merits of the case. We therefore find that this court has jurisdiction to entertain **Perez's** appeal from the denial of the motion of summary judgment relating to the qualified immunity defense.

On appeal, we now consider, taking all facts and inferences in favor of **Cunningham**, whether **Perez** is entitled to qualified immunity as a matter of law.

III. *Qualified Immunity*

We review de novo **Perez's** qualified immunity claim. *Mena v. City of Simi Valley,* 226 F.3d 1031, 1036 (9th Cir. 2000). Government officials are entitled to immunity if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The analysis begins with this threshold question: "[D]o the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). If no constitutional violation is shown, the inquiry ends. *Id.* If, however, a constitutional violation occurred, the second question is "whether the right is clearly established." *Id.* A constitutional right is clearly established when "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 121 S.Ct. 2151. We now evaluate each of **Cunningham's** claims, determining whether a constitutional violation occurred and, if so, whether a reasonable officer would have acted in the same manner as Perez did.

A. ***Cunningham's*** *Coercive Interrogation Claim*

Cunningham alleges that **Perez** violated his Fifth and Fourteenth Amendment rights to be free from coercive interrogation. A coercive interrogation exists when the totality of the circumstances shows that the officer's tactics undermined the suspect's ability to exercise his free will. *Haynes v. Washington,* 373 U.S. 503, 513, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963).

Here, we hold **Perez's** interrogation as demonstrated by the pretrial record did not undermine **Cunningham's** free will. While it is true that the interrogation lasted for eight hours, **Perez** did not refuse to give **Cunningham** a break for food or water. **Perez** also never yelled and failed to use violence or the threat of violence. **Perez's** questions may have unsettled **Cunningham**, but mere emotionalism and confusion do not invalidate confessions. *United States v. Miller,* 984 F.2d 1028, 1032 (9th Cir. 1993). Further, continuing to question a suspect after the suspect claims he is innocent does not constitute coercion and is often necessary to achieve the truth. *See Amaya-Ruiz v. Stewart,* 121 F.3d 486, 494 (9th Cir. 1997) (stating officers' repeated insistence that the suspect tell the truth did not amount to coercion). **Perez's** suggestion that **Cunningham's** cooperation could lead to treatment rather than prison is also not coercive. *See United States v. Leon Guerrero,* 847 F.2d 1363, 1366 (9th Cir. 1988) (holding an interrogator's promise to recommend leniency does not render a suspect's confession involuntary). Similarly, **Perez's** statement that he has put people in prison did not contribute to undermining **Cunningham's** free will. Officers are allowed to recite the sentence a suspect may receive if found guilty. *See United States v. Bautista-Avila,* 6 F.3d 1360, 1365 (9th Cir. 1993); *see also United States v.*

Sablotny, 21 F.3d 747, 752-53 (7th Cir. 1994) (holding officers are allowed to play upon the suspect's fear of prison).

While it is true that **Perez** denied **Cunningham's** request to call his therapist, there is no constitutional right to call a therapist during an interrogation. **Cunningham** also cannot point to his bi-polar medication to invalidate the confession because confessions can be voluntary even if the effects of medication influence a suspect's statements. *United States v. Martin,* 781 F.2d 671, 673-74 (9th Cir. 1985). Further, **Cunningham's** mental disorder cannot invalidate his confession because he has not first shown that **Perez** used coercive tactics. *See Colorado v. Connelly,* 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

When viewing the totality of the circumstances, **Perez's** conduct did not undermine **Cunningham's** free will. Other cases finding coercion have been far more outrageous. *See, e.g., Mincey v. Arizona,* 437 U.S. 385, 398-99, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (finding statement obtained from a defendant who was in the hospital, in near coma condition, and in great pain, while fastened to tubes, needles, and a breathing apparatus, could not have been voluntary); *Haynes,* 373 U.S. at 511-12, 83 S.Ct. 1336 (1963) (invalidating confession where suspect was held for over five days and never advised of his rights); *Ashcraft v. Tennessee,* 322 U.S. 143, 149-54, 64 S.Ct. 921, 88 L.Ed. 1192 (1944) (invalidating confession because police questioned suspect for thirty-six hours straight); *Henry v. Kernan,* 197 F.3d 1021, 1028 (9th Cir. 1999) (finding confession was involuntary because detectives admittedly continued the interrogation after the suspect clearly invoked his *Miranda* rights); *California Attorneys*

for Criminal Justice v. Butts, 195 F.3d 1039, 1046 (9th Cir. 1999) (finding coercive interrogation because the police disregarded the suspect's *Miranda* rights); *United States v. Tingle,* 658 F.2d 1332, 1335-36 (9th Cir. 1981) (finding confession involuntary when officer recited a litany of maximum penalties for the suspect's alleged crimes, expressly stated that the suspect would not see her child "for a while," and warned the suspect that if she failed to cooperate he would inform the prosecutor that she was "stubborn or hard-headed").

B. ***Cunningham's*** *Probable Cause Claim*

Cunningham also claims his arrest violated the Fourth Amendment because it was based solely upon a coerced, illegal confession. We disagree. Probable cause arises when police have knowledge based on reasonably trustworthy information that the person arrested has committed a criminal offense. *Beck v. Ohio,* 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). Our holding that **Cunningham's** confession was not coerced, coupled with Jessica's allegations of abuse, gave **Perez** probable cause. Thus, **Perez** did not violate the Fourth Amendment.

C. ***Cunningham's*** *Deliberate-Fabrication-of-Evidence Claim*

Cunningham next argues **Perez** violated his right to be free from prosecution based on false evidence. We have held "there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." *Devereaux v. Abbey,* 263 F.3d 1070, 1074-75 (9th Cir. 2001) (en banc). To prevail, **Cunningham**

must show: (1) **Perez** continued his investigation "despite the fact that[he] knew or should have known that **[Cunningham]** was innocent; or (2) **[Perez]** used investigative techniques that were so coercive and abusive that [he] knew or should have known those techniques would yield false information." *Id.* at 1076.

First, **Cunningham** alleges that **Perez** should have known he was innocent because his confession was coerced and his daughters did not immediately corroborate the confession. We do not agree. **Cunningham's** confession was legal, and thus it was reasonable for **Perez** to continue the investigation. Further, the daughters' initial failure to corroborate **Cunningham's** confession is not sufficient for Perez to cease the investigation. It is common for sex abuse victims to suppress memories of the assault or deny that it happened. **Perez** thus did not violate **Cunningham's** rights by continuing the investigation.

Second, **Cunningham** alleges that **Perez** used coercive tactics while interviewing **Cunningham's** daughters which he knew would yield false information. It is true that **Perez** kept questioning the daughters after they initially denied the sex abuse. **Perez** may have also told Jessica that she could not leave Pinecrest until she confessed to the abuse. **Perez's** conduct, while inappropriate, does not satisfy *Devereaux*. **Cunningham** must produce more than mere allegations that **Perez** used improper interview techniques. *Id.* Further, the court gives interviewers of child witnesses suspected of sexual abuse "discretion in deciding when to accept initial denials at face value and when to reject them . . . ." *Id.* at 1077. Accordingly, **Perez's** interviews were not so coercive and abusive that he knew or should have known that he would receive false information.

*D. **Cunningham's** Exculpatory Evidence Claim*

Cunningham concludes by arguing that **Perez** violated the Due Process Clause of the Fourteenth Amendment by failing to preserve and gather exculpatory evidence. A police officer's failure to preserve or collect potential exculpatory evidence does not violate the Due Process Clause unless the officer acted in bad faith. *Arizona v. Youngblood,* 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); *Miller v. Vasquez,* 868 F.2d 1116, 1120 (9th Cir. 1989). "The presence or absence of bad faith . . . turn[s] on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Youngblood,* 488 U.S. at 57, 109 S.Ct. 333.

Cunningham claims **Perez** acted in bad faith because he failed to document his interrogations and did not keep a record of Jennifer and Sarah's statements denying sexual abuse. **Perez** also failed to gather any physical evidence, such as bed sheets or clothing, which could have exonerated **Cunningham**. These facts are not specific or compelling enough to show bad faith. *See Jeffers,* 267 F.3d at 907(stating plaintiff must "put forward specific, nonconclusory factual allegations that establish improper motive") (internal quotations omitted). **Perez's** failure to document his interrogations does not illustrate an improper motive because **Perez** likely believed his tactics were lawful, a conclusion which we reached earlier in the opinion. Further, **Perez's** failure to gather any physical evidence does not show bad faith because the value of the untested evidence is speculative. It could have exonerated **Cunningham**, but it also could have incriminated him. While **Perez's** investigative work may have been negligent or incomplete, it was not conducted in bad faith. **Perez's** investigation differs from cases in which the court

has found an improper motive. In *Miller v. Vasquez,* 868 F.2d 1116 (9th Cir. 1989), for instance, the officer referred to the defendant using an expletive and lied about his knowledge of potential exculpatory evidence. *Id.* at 1121. The officer also tried to dissuade witnesses from testifying in favor of the defendant. *Id.* **Perez's** alleged conduct did not rise to this level. *Id.* Accordingly, we find **Cunningham** has not alleged specific, nonconclusory facts showing **Perez** engaged in "a conscious effort to suppress exculpatory evidence." *California v. Trombetta,* 467 U.S. 479, 488, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

IV. *Conclusion*

We hold **Perez** is entitled to summary judgment. His investigation of **Cunningham's** alleged sex crimes does not amount to a constitutional violation. The judgment of the district court is, therefore, REVERSED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

HENRY H. CUNNINGHAM, Plaintiff, -vs- CITY OF WENATCHEE; CHELAN COUNTY; BARKER & HOWARD, P.S.; ROBERT R. PEREZ and JANE DOE PEREZ, and the marital community composed thereof; KENNETH BADGLEY and JANE DOE BADGLEY, and the marital community composed thereof; JEFFREY C. BARKER and DEBRA L. BARKER, and the marital community formerly composed thereof; REBECCA CARROLL and JOHN DOE CARROLL, and the marital community composed thereof, Defendants.	NO. CS-01-0058-WFN ORDER (Filed Aug. 1, 2002)

On July 12, 2002, the Court heard oral argument on the summary judgment motions of Defendants Chelan County, City of Wenatchee, Robert Perez, Kenneth & Jane Doe Badgley, Jeffrey Barker, Barker & Howard, P.S., Debra Baker, Rebecca Carroll and John Doe Carroll. Glenn Draper and Michael Pierson participated on behalf of Plaintiff; Patrick McMahon participated on behalf of Defendants City of Wenatchee, Robert Perez, and Kenneth and Jane Doe Badgley; Linda Choy participated telephonically on behalf of Defendant Chelan County; and Jennifer

Ilenstine participated on behalf of Defendants Jeffrey and Debra Baker, Rebecca and John Doe Carroll, and Barker & Howard, P.S.

The Motion for Summary Judgment of Defendant Luci Perez was considered without oral argument. The Court took the matter under advisement.

I. BACKGROUND

Plaintiff filed this civil rights lawsuit against the City of Wenatchee, Chelan County, Barker & Howard, P.S., and various other persons who were involved in the investigation, prosecution, conviction and representation of Plaintiff for alleged child sex abuse. Plaintiff alleged causes of action for civil rights violations and conspiracy to violate civil rights under 42 U.S.C. § 1983, as well as state law claims for negligence, breach of contract, professional negligence, false arrest, malicious prosecution, interference with custodial relations, negligent infliction of emotional distress, and outrage. Plaintiff seeks damages in excess of $10 million, plus punitive damages, attorney's fees, and costs.

II. FACTS

In the late spring of 1994, Henry and Connie Cunningham lived at home in Wenatchee, Washington, with three of their four daughters: Jennifer, then 19, Sarah, then 17, and Jessica, then 17 [sic]. Their oldest daughter, Carrie, then 21, had moved out to go to college. Plaintiff Cunningham suffered from bipolar disorder.

Defendant Robert Perez, previously a law enforcement officer for 16 years, was employed with the City of Wenatchee for 13.5 of those years. Defendant Perez completed his basic law enforcement training course from the Washington State Criminal Justice Training Commission (which consisted of a 440-hour course) in 1993.

During his tenure with the Wenatchee Police Department [WPD], [sic] was appointed to be a detective of crimes against persons for a two-year period, from January 1, 1994 to December 31, 1995. As a result of this assignment, he received a three-day satellite course sanctioned by the Washington State Criminal Justice Training Commission in December of 1993, specifically relating to child sex abuse investigations. Defendant Perez also attended a five-day forty-hour course regarding child abuse investigation.

Defendant Kenneth Badgley appointed [sic] Chief of Police for the City of Wenatchee Police Department in 1978. He retired from this position in January, 2001. As Chief of Police, Kenneth Badgley did not conduct any of the day-to-day investigations that were undertaken by the WPD.

In May, 1994, Plaintiff Cunningham and his then wife, Connie Cunningham, decided to hospitalize their youngest daughter, Jessica, in a psychiatric facility in Idaho (known as Pinecrest Hospital). Jessica had behavioral and drug problems, was depressed, suicidal, and wanted to run away from home.

At Pinecrest, Jessica claimed that she had "remembered" that her father sexually abused her on multiple occasions when she was five years old in Moses Lake. A

Pinecrest therapist, Sherry Speare, contacted the Washington State Department of Social and Health Services [DSHS], Child Protective Services [CPS] office in Wenatchee, Washington, where the Cunninghams resided, to report Jessica Cunningham's claim of sexual abuse. Because this initial referral from Pinecrest described abuse occurring only in the Moses Lake area, Wenatchee CPS forwarded the referral to the CPS office in the Moses Lake area for investigation, as well as to the local police in Moses Lake, with a courtesy copy sent to the Wenatchee Police Department. Ms. Speare also reported to CPS on May 27, 1994, that Jessica Cunningham's mother, Connie Cunningham, was aware of Jessica's disclosure, but Plaintiff was not. The CPS referral was received by the WPD on June 2, 1994.

On June 3, 1994, upon the recommendation of his psychiatrist, Plaintiff drove to the Wenatchee Police Department, where he asked to speak with Detective Robert Perez. Plaintiff met with Defendant Detective Perez for eight hours. During Plaintiff's discussion with Defendant Detective Perez on June 3, 1994, Plaintiff made a detailed statement wherein he admitted to sexually abusing his daughter Jessica in Moses Lake and in Wenatchee, as well as sexually abusing his three other daughters, Sarah, Jennifer, and Carrie in Wenatchee and elsewhere. A written statement was prepared while the Plaintiff was present and signed by Plaintiff on each of the four and one-half pages. Plaintiff was thereupon arrested.

Recently, Jessica Cunningham testified that: (a) she was told to go to Sheri Speare's office where she met with Defendant Detective Perez and Defendant Reiman; (b) there was nobody else in the office; (c) she was told that she could not leave, and that she had to talk with them;

(d) she was asked many questions and Defendant Detective Perez did most of the talking; (e) when she told them nothing had happened or that she didn't remember, she was called a liar; (f) she was told she would have to stay in Pinecrest until she told them that her parents did things to her and her sisters; (g) they kept questioning her about the same things, telling her she was hiding the truth; (h) after several hours, she agreed to write down some answers to Defendant Detective Perez's written questions; (i) Defendant Detective Perez tore up his notes when they were finished; and (j) Defendant Detective Perez had a tape records [sic] with him, and recorded the interview (the location of the tape is unknown).

Jessica Cunningham further testified that: she did not want to stay at Pinecrest; she considered the place "hell"; she was medicated against her will; and she was withheld privileges if she didn't do what they wanted. She also testified that she did not make any disclosures of sexual abuse to anyone at Pinecrest until after this interview.

On June 9, 1994, Defendant Perez and Dean Reiman, a CPS caseworker, interviewed Jessica Cunningham, wherein she related numerous acts of sexual abuse by her father. Also on that date, Jeffrey Barker was appointed to represent Plaintiff on the pending criminal charges.

On June 10, 1994, Defendant Detective Perez interviewed Jennifer and Sarah Cunningham, wherein they made allegations of sexual abuse against both of their parents. Again, these statements are inconsistent with statements made by Jennifer and Sarah elsewhere.

On June 15, 1994, a Chelan County Prosecutor, Alicia Nakata, filed a supplemental affidavit of probable cause and amended information reciting the allegations of

sexual abuse made by Sarah and Jessica Cunningham to Defendant Detective Perez on June 10, 1994, and charging Plaintiff with sexually abusing them, as well as Jessica Cunningham.

On June 15, 1994, Dean Reiman brought a motion in the juvenile court seeking authorization to place Jessica and Sarah Cunningham in shelter care, which Chelan County Superior Court Judge Carol Wardell granted that same day. Also on June 15, 1994, Defendant Reiman petitioned the juvenile court to have the Cunninghams' two minor children, Jessica and Sarah, made dependents of the court.

Defendant Carroll, then employed with Barker & Howard, was appointed to represent the Plaintiff in the dependency actions.

On July 21, 1994, the juvenile court conducted a placement hearing and approved the foster care placements and continued shelter care of Jessica and Sarah Cunningham. On July 22, 1994, Defendant Reiman submitted to the juvenile court his report for dependency fact-finding hearing.

On August 15, 1994, Plaintiff pled guilty to the charges of sexually abusing Jessica, Sarah, and Jennifer Cunningham, and adopted by attachment his June 3, 1994, written statement as the factual basis for the plea.

On August 26, 1994, Defendant Reiman filed amended dependency petitions for Jessica and Sarah Cunningham, referencing Plaintiff's plea of guilty and the continuing incarceration of Connie Cunningham pending her criminal trial, scheduled for August 30, 1994.

On September 9, 1994, a jury found Connie Cunningham guilty of sexually abusing her daughters.

On October 19, 1994, Plaintiff signed a relinquishment of custody, consent to termination/adoption, and waiver of right to receive notice of proceedings.

On October 21, 1994, a dependency fact-finding and disposition hearing was held in Plaintiff's absence pursuant to the aforementioned relinquishment, consent and waiver. Defendant Carroll discontinued her representation of Plaintiff.

On December 1, 1994, the juvenile court entered a permanency planning review order.

On December 7, 1994, Dean Reiman transferred the Jessica and Sarah Cunningham cases from CPS to DSHS's Child Welfare Services [CWS] for ongoing permanency planning. At this point Defendant Reiman ceased to be involved in the Cunningham case.

On July 6, 1995, the juvenile court entered findings of fact and orders terminating Plaintiff's parental rights as to both Jessica and Sarah Cunningham without the participation of Plaintiff pursuant to the aforementioned relinquishment, consent and waiver.

Mr. Barker continued to represent Plaintiff with regard to the appeal of his exceptional sentence. Eric Christiansen, an attorney formerly employed with Barker & Howard, worked with Mr. Barker on Plaintiff's appeal.

On July 31, 1995, Defendant Carroll wrote Plaintiff a letter advising him that she no longer represented him, that his parental rights had been terminated.

On March 18, 1997, the Court of Appeals affirmed Plaintiff's exceptional sentence.

On March 27, 1997, Mr. Christiansen wrote Plaintiff a letter, explaining the Court of Appeals decision and advising Plaintiff that the attorneys at Barker & Howard no longer represented him.

Connie Cunningham appealed her criminal conviction, resulting in a reversal and remand for a new trial due to a finding that the admission of the Plaintiff's written statement in her trial, where there was no showing Plaintiff was unavailable to testify, violated Connie Cunningham's rights under the Sixth Amendment confrontation clause.

On March 4, 1999, the Washington Court of Appeals vacated the Plaintiff's conviction, after the prosecutor agreed to Petitioner's Personal Restraint Petition, and allowed Plaintiff to withdraw his guilty plea and receive a new trial. On November 3, 1999, Plaintiff and the local prosecutor jointly moved for an order dismissing the criminal charge against him. The Order was entered on November 5, 1999, terminating the criminal proceeding against Plaintiff.

III. SUMMARY JUDGMENT MOTIONS

Summary Judgment Standard. One of the principal purposes of the summary judgment procedure is to identify and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The United States Supreme Court has declared that summary judgment must be granted against a party who fails to demonstrate facts to establish an element

essential to its case where that party will bear the burden of proof of that essential element at trial. *Celotex* at 322. "If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact [citations omitted], the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment." *T.W. Electrical Serv. v. Pacific Elec. Contractors Assoc.*, 804 F.2d 626, 630 (9th Cir. 1987). Instead, Rule 56(e) requires that the nonmoving party set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial. *Id.* At least some "significant probative evidence tending to support the complaint" must be produced. *Id.* Legal memoranda and oral argument are not evidence and do not create issues of act [sic] capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978).

The Ninth Circuit has established that "[n]o longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987). "[I]f the factual context makes the nonmoving party's claim *implausible*, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Id.* at 1468 (emphasis in original), citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

At summary judgment, the judge must view the evidence in the light most favorable to the nonmoving party; if direct evidence produced by the moving party

conflicts with direct evidence produced by the nonmoving party, the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact. *See Leslie v. Grupo ICA*, 198 F.3d 1152, 1158 (9th Cir. 1999). The court's function on a summary judgment motion is not to make credibility determinations or weigh conflicting evidence with respect to a disputed material fact. *See T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

Civil Rights Claims. 42 U.S.C.A. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C.A. § 1983 authorizes redress for violations of federal constitutional and statutory rights and provides a remedy for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes. *Wilson v. Garcia*, 471 U.S. 261 (1985).

To prove a case under § 1983, the Plaintiff must demonstrate: (1) the action occurred under color of state law; and (2) the action resulted in the deprivation of a constitutional right or federal statutory right. *Jones v. Williams*, 286 F.3d 1159, 1162-1163 (9th Cir. 2002). A person acts under color of state law only when exercising power "possessed by virtue of state law and made possible

only because the wrongdoer is clothed with the authority of state law." *United States v. Classic*, 313 U.S. 299, 326 (1941); *McDade v. West*, 223 F.3d 1135, 1139-40 (9th Cir. 2000).

Municipality Claims. A local government unit cannot be held liable pursuant to 42 U.S.C.A. § 1983 under respondeat superior, i.e., merely because it employs a tortfeasor. *Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658, 690-94 (1978); *Duvall v. County of Kitsap*, 260 F.3d 1124, 1141 (9th Cir. 2001). Under *Monell* and its progeny, a local government may be liable only where the municipality *itself* causes the constitutional violation. *See Bd. of the County Comm'rs v. Brown*, 520 U.S. 397, 403 (1997). A *Monell* claim exists through the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694.

A "custom" or "policy" typically takes one of three forms: (1) where a municipal employee committed constitutional violation pursuant to formal governmental policy or longstanding practice or custom constituting standard operating procedure of local governmental entity, (2) individual who committed constitutional tort was official with final policy-making authority, or (3) that official with final policy-making authority ratified subordinate's unconstitutional decision or action and the basis for it. *Gillette v. Delmore*, 979 F.2d 1342 (9th Cir. 1992).

The imposition of a policy requirement is intended to distinguish acts of the municipality from acts of its employees so that municipal liability under § 1983 is limited

to actions for which the municipality is actually responsible. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986). Municipal liability can be imposed when conduct reflects "practices of . . . officials permanent and well-settled as to constitute a 'custom' and usage with the force of law." *Monell*, 436 U.S. at 691. "A municipal 'custom' may be established by proof of the knowledge of policy-making officials and their acquiescence in the established practice." *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 511 (1993).

A municipality's policy of inaction may also constitute grounds for suit where the failure "amounts to deliberate indifference to the rights of persons" impacted by the inaction. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). *See also Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992). This is often reflected in a claim against a municipality for failure to train its employees. *See, e.g., Canton*, 489 U.S. at 392-94. However, "the inadequacy of training policy may serve as a basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom [officers] come in contact." *Canton*, 489 U.S. at 387.

Deliberate indifference to a person's constitutional rights occurs when the need for more or different action, "is so obvious, and the inadequacy [of the current procedure] so likely to result in the violation of constitutional rights, that the policymakers . . . can reasonably be said to have been deliberately indifferent to the need." *Oviatt*, 954 F.2d at 1477-78 (quoting *City of Canton*, 489 U.S. at 390). *See also Bd. of the County Comm'rs*, 520 U.S. at 410 ("'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known

or obvious consequence of his action."). Additionally, a municipality may be held responsible where a pattern of unconstitutional conduct is so pervasive as to imply actual or constructive knowledge of the policymakers, whose deliberate indifference to the unconstitutional practice is evidenced by failure to correct the situation when the need for training becomes obvious. *Canton*, 489 U.S. at 396-97.

The underlying rationale is that local governmental inaction rising to the level of deliberate indifference reflects a conscious choice to violate the victim's rights and, thus, represents an actionable city "policy" under §§ 1983. *City of Canton*, 489 U.S. at 389; *Lee v. City of Los Angeles*, 250 F.3d 668, 681 (9th Cir. 2001).

For liability to attach, a plaintiff must establish that the alleged inaction is so "closely related to the ultimate injury" as to constitute the "moving force behind" the constitutional violation. *Canton*, 489 U.S. at 391. Further, "a plaintiff must show that his or her constitutional 'injury would have been avoided' had the governmental entity properly trained its employees." *Lee*, 250 F.3d at 681.

1. CITY OF WENATCHEE

Civil Rights Claim – Deliberate Indifference. Plaintiff asserts a claim against the City of Wenatchee for a violation of his constitutional rights through the implementation of policies that the City of Wenatchee permitted by their widespread use of customs including its policies of: (1) allowing the routine use of patently coercive interrogation methods; (2) failing to corroborate the so-called "confessions"; (3) failing to document exculpatory evidence, especially child sexual abuse interviews in which the child denied sexual abuse occurred; and (4) routinely allowing

use of child interview techniques that are unsound and lead to false and unreliable evidence.

Plaintiff asserts that a claim can be proven that the custom or practice was so widespread as to constitute de facto policy. *Monell*, 436 U.S. at 694. However, "before the actions of subordinate city employees can give rise to § 1983 liability, their . . . practices must be so manifest as to imply the constructive acquiescence of senior policy-making officials." *Sorlucco v. New York City Police Dept.*, 971 F.2d 864, 871 (2nd Cir. 1992) (citations omitted).

As evidence of the municipal notice of the policy, Plaintiff cites the testimony of a number of people with whom Defendant Perez had contact. He also provides the deposition testimony of another former officer who, apparently like Defendant Perez, would not gather corroborative physical evidence when a confession was obtained from a suspect. Plaintiff then concludes that this conduct is unacceptable without discussing how the knowledge of the conduct is imputed to the policymaking officials. Plaintiff declares that this practice of not corroborating confessions allowed Defendant Perez to "elicit false confessions with impunity." However, based on the evidence provided, there is no evidence of liability-triggering knowledge or ratification of the municipality. Plaintiff claims that Defendant City of Wenatchee, in failing to institute a policy for corroboration of confessions with evidence and for "turning a blind eye" to Defendant Perez's conduct, evinced "deliberate indifference" to the Plaintiff's rights. None is shown.

When addressing the claim for "widespread practice of failing to document exculpatory evidence," Plaintiff states that there is a "particularly widespread" practice in the area of child sex abuse cases, but he does not attempt to

attribute it to the City of Wenatchee. Contrary to Plaintiff's claim, there is not "ample evidence" from which a jury could conclude that the City of Wenatchee had a policy of failing to document interviews because he has failed to explain how it was ratified by Defendant City of Wenatchee.

Contrary to Plaintiff's position and the affidavit testimony, while the techniques employed by Defendant Perez and/or other officers might well have lead to the production of false and unreliable evidence, Plaintiff has not shown evidence that the techniques were adopted, ratified, or even known to Defendant City of Wenatchee.

Under the "deliberate indifference" standard, there must be obvious inadequacy in the current circumstances and risk of constitutional harm, that the policymaker is deliberately indifferent to the need for reparation. *Oviatt*, 954 F.2d at 1477-78 (quoting *City of Canton*, 489 U.S. at 390). It is recognized as a high standard to meet, "requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bd. of the County Comm'rs*, 520 U.S. at 410.

The custom or policy of inaction must be the result of a "conscious," *City of Canton v. Harris*, 489 U.S. 378, 389, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989), or "deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986).

Plaintiff has made no showing that Defendant City of Wenatchee acted according to customs or policies which amounted to a deliberate indifference of his constitutional

rights. Because he has failed to make out a prima facie case, summary judgment on the claims against the City of Wenatchee must be granted.

Defendant Perez as a Policymaker. Plaintiff claims that Defendant Perez had a policymaking role for the purposes of finding liability on behalf of the City of Wenatchee.

The issue of whether a particular official has final policymaking authority is a state law question. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124-26 (1988). In *David v. City of Ellensburg*, 869 F.2d 1230, 1233-34 (9th Cir. 1989), the court addressed whether or not a municipal police officer in Washington state could be held to be a policymaker under 42 U.S.C. § 1983. The trial court granted summary judgment in favor of the city after the plaintiff failed to establish a material issue of fact on summary judgment. The plaintiff appealed. In this context, the Ninth Circuit decided that, "[a] plaintiff cannot prove the existence of a *municipal* policy or custom based solely on the occurrence of a single incident of unconstitutional action by a non-policymaking employee." *Davis*, 869 F.2d at 1233-34 (citing *City of Oklahoma City v. Tuttle*, 471 U.S. 469, 480, 106 S. Ct. 1292, 1298, 89 L. Ed. 2d 452 (1986) ("[I]t is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances.") (plurality opinion)).

There does not appear to be a basis for Plaintiff's assertion that Defendant Perez was a policymaker for the purposes of a section 1983 action.

Failure to Train and Supervise. Plaintiff claims that the City of Wenatchee, through its police department, inadequately trained and supervised its officers. However,

Plaintiff does not offer evidence of a failure to train or how a lack of training amounts to deliberate indifference in this case. Finally, Plaintiff fails to show how it is the moving force vehicle [sic] the alleged violation.

2. CHELAN COUNTY

Civil Rights Claim. Plaintiff claims that the low-bid contract system for indigent defense employed by Chelan County at the time of his representation was so flawed that it denied indigent defendants, including Plaintiff, their Sixth Amendment Rights in that it failed to ensure that the attorneys contracted were adequately trained, supported and supervised by Chelan County.

In support of his claim, Plaintiff sets forth a state statute that requires municipalities providing public defense services – be they public defenders' offices, assigned counsel or contracted services – adopt standards for the services. Wash. Rev. Code § 10.101.030.[1] Plaintiff

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[1] R.C.W. 10.101.030 provides:

Each county or city under this chapter shall adopt standards for the delivery of public defense services, whether those services are provided by contract, assigned counsel, or a public defender office. Standards shall include the following: Compensation of counsel, duties and responsibilities of counsel, case load limits and types of cases, responsibility for expert witness fees and other costs associated with representation, administrative expenses, support services, reports of attorney activity and vouchers, training, supervision, monitoring and evaluation of attorneys, substitution of attorneys or assignment of contracts, limitations on private practice of contract attorneys, qualifications of attorneys, disposition of client complaints, cause for termination of contract or removal of attorney, and nondiscrimination. The standards

(Continued on following page)

claims that Chelan County's failure to address each of the required standards is proof of its liability. However, violations of state statutes are not sufficient to allege a cause of action under 42 U.S.C.A. § 1983, which protests only rights secured by the Constitution and statutes of the United States. *Stiltner v. Rhay*, 322 F.2d 314, 315 (9th Cir. 1963).

Plaintiff complains that the emphasis on payment in the contract between Chelan County and its contracted attorneys is significant as well as caseloads, payment for investigators and experts, training and supervision, and conflict counsel. Even if these standards were developed by the County, the County would still be Constitutionally required to observe the attorney's professional independence. *Polk County v. Dodson*, 454 U.S. 312, 321-22 (1981). As noted in *Polk County*:

> This Court's decision in *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), established the right of state criminal defendants to the "'guiding hand of counsel at every step in the proceedings against [them].'" *Id.*, at 345, 83 S. Ct., at 797, quoting *Powell v. Alabama*, 287 U.S. 45, 69, 53 S. Ct. 55, 64, 77 L. Ed. 158 (1932). Implicit in the concept of a "guiding hand" is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate. See, *e.g.*,

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endorsed by the Washington state bar association for the provision of public defense services may serve as guidelines to contracting authorities.

Gideon v. Wainwright, supra; *Holloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978).

Polk County, 454 U.S. at 322.

Even if the County were so inclined to exercise more control over its public defenders through "the quality of his law library or the size of his caseload", the lawyer himself "is not, and by the nature of his function, cannot be, the servant of an administrative superior." *Polk*, 454 U.S. at 321.

Plaintiff attempts to advocate Chelan County's liability on the basis of the low-bid system by citing to authority wherein criminal defendants were found to have had their rights violated by backlogged, overworked or otherwise poorly run public defender offices seeking relief under habeas corpus. However, the standard for criminal defendants' relief from their unconstitutional sentences is completely separate and apart from one seeking damages under section 1983.

Plaintiff's claims must fail against Chelan County in that, due to the County's restraints under the Constitution, the County could not do anything of substance to protect the Plaintiff from unconstitutional treatment arising from his representation. Consequently, Plaintiff's claims against Chelan County will fail for lack of proximate cause. Regardless of the County's acts or omissions, the attorney would ultimately be responsible for Plaintiff's treatment while under the attorney's representation. *See Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981) (holding that plaintiff could not prove causation where IBM created a task force which violated plaintiff's constitutional rights. While IBM was the "but for" cause of plaintiff's

injuries, IBM did not have sufficient control over the task force to be held responsible for its actions).

Civil Rights Claims – Deliberate Indifference. Plaintiff also pleads a general "deliberate indifference" claim purportedly under *City of Canton v. Harris*, 489 U.S. 378 (1989). As Defendant Chelan County noted, this argument is difficult to follow. Essentially, Plaintiff claims Chelan County, through its employees, is liable for having exhibited deliberate indifference toward Plaintiff. Plaintiff claims that the Chelan County Commissioners received a formal report from a committee of Chelan and Douglas County judges and attorneys setting forth the public defender standards in R.C.W. 10.101.030, and recommended that Chelan County adopt provisions to comply with the statute. Chelan County then continued to engage in a "pattern of indifference" when the Chelan County judges forwarded a letter to the Commissioners expressing concern with respect to Barker & Howard and asking for an independent review of the firm.

Given the County's failure to comply with the report, Plaintiff claims, "a reasonable jury could find that the County Commissioners violated Mr. Cunningham's rights."

It would appear that Plaintiff is claiming that the County failed to act with respect to remedial action against Barker & Howard, that their failure to act in the face of the need for more or a different action was so obvious, and the inadequacy of the current situation was so likely to result in the violation of constitutional rights, that the County could reasonably be said to have been deliberately indifferent to the need. *Oviatt*, 954 F.2d at 1477-78 (quoting *City of Canton*, 489 U.S. at 390).

This claim directly relates to the purported failure of Chelan County to more stringently oversee the work of Barker & Howard which is addressed in section 3, *infra*. However, as noted in that section, public defenders cannot be sued as an agent of the State or act "under color of state law." *Polk County v. Dodson*, 454 U.S. 312 (1981). *See also Miranda v. Clark County*, 279 F.3d 1102, *reh'g en banc granted*, 2002 WL 1733252 (9th Cir. July 24, 2002). Thus, the claim must fail.

3. LAWYER DEFENDANTS

Civil Rights Claims. Plaintiff asserts that attorneys Jeffrey Barker, Rebecca Carroll, and the firm Barker & Howard, P.S. (hereinafter "Lawyer Defendants"), are liable under 42 U.S.C. § 1983. However, attorneys did not act "under color of state law" executing their duties as public defenders. *Polk County v. Dodson*, 454 U.S. 312, 324-25 (1981). *Cf. Branti v. Finkel*, 445 U.S. 507 (1980), (finding a public defender to be a state actor when making hiring and firing decisions on behalf of the State). Plaintiff does not provide factual support for a claim under *Branti*, – where attorneys are acting under color of state law in the performance of certain administrative or investigative functions. However, it does not appear that it would apply to these facts in any event.

4. DEFENDANT BADGLEY

Civil Rights Claims – Supervisory. In general, supervisory officials are not liable for the actions of subordinates on any theory of vicarious liability under 42 U.S.C. § 1983. *Hansen v. Black*, 885 F.2d 642, 645-46 (9th Cir. 1989). A supervisor may be held liable under section 1983

only if there exists either "'(1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.'" *Redman v. County of San Diego*, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc) (quoting *Hansen*, 885 F.2d at 646); *see also Mackinney v. Nielsen*, 69 F.3d 1002, 1008 (9th Cir. 1995).

Plaintiff must allege personal acts by the supervisor of individuals responsible for a constitutional violation which have a direct causal connection to the violation at issue; at a minimum, this requires an allegation that the supervisor ordered, knew of, or consented to the alleged violation. *Buckley v. Gomez*, 36 F. Supp. 2d 1216 (S.D. Cal. 1997), *aff'd*, 168 F.3d 498 (9th Cir. 1999). A supervisor is not liable under § 1983 for the actions of a subordinate unless an affirmative link exists between constitutional deprivation and either the supervisor's personal participation or his failure to supervise. *Grimsley v. MacKay*, 93 F.3d 676 (10th Cir. 1996).

Here, Plaintiff claims that Defendant Badgley reviewed all of the police reports, knew of Defendant Perez's proclivities and failed to note Defendant Perez's deficiencies in reports or require follow-up reports. Plaintiff claims that there is no evidence that Defendant Badgley took remedial action with respect to Defendant Perez. Plaintiff also claims Defendant Badgley "permitted the customs and policies" discussed in his brief to flourish. Plaintiff claims there are genuine issues of material fact regarding Defendant Badgley's "complicity in permitting Officer Perez the freedom to pursue his improper and unconstitutional methods."

Plaintiff cannot sustain a cause of action on these bases in that he did not establish Defendant Badgley's personal involvement in the constitutional deprivation, establish a sufficient causal connection between Defendant Badgley's wrongful conduct and the constitutional violation, and failed to establish an affirmative link exists between constitutional deprivation and either the supervisor's personal participation or his failure to supervise.

Civil Rights – Personal Claims. An individual defendant in a § 1983 action can be held liable only upon a showing that he or she was personally responsible for, or personally involved in, the deprivation of rights which is the basis for the suit. *Sprint Spectrum L.P. v. Mills*, 65 F. Supp. 2d 161, (S.D.N.Y. 1999).

Here, Plaintiff claims that Defendant Badgley acted with malice or reckless disregard for whether Plaintiff's rights would be violated. Plaintiff cannot sustain a claim on the evidence in the record.

5. DEFENDANT PEREZ

Qualified Immunity. Government officials enjoy qualified immunity from civil damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Behrens*, 516 U.S. at 306, 116 S. Ct. 834 (describing Harlow's standard as one of "objective legal reasonableness"). "A public official is not entitled to qualified immunity when the contours of the allegedly violated right were sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right."

Osolinski v. Kane, 92 F.3d 934, 936 (9th Cir. 1996) (alterations in original) (citation and internal quotations omitted).

Determining whether a public official is entitled to qualified immunity "requires a two-part inquiry: (1) Was the law governing the state official's conduct clearly established? (2) Under that law could a reasonable state official have believed his conduct was lawful?" *Browning v. Vernon*, 44 F.3d 818, 822 (9th Cir. 1995) (citing *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871-72 (9th Cir. 1993)).

With respect to the first step of the two-step qualified immunity inquiry, the Court finds that there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government. *Devereauz v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001).

With respect to the second step, the court finds that there is enough doubt to find that a reasonable state official would not have believed his conduct was lawful. Defendant Perez is not entitled to qualified immunity.

Civil Rights Claims. Plaintiff alleges that based on all of the facts and circumstances in this case, there are genuine issues of fact with respect to Defendant Perez's liability on all pending claims. Thus, his Motion for Summary Judgment is denied.

6. CONSPIRACY CLAIM: IDSAT Involvement (Chelan County and Perez).

Plaintiff fails to defend the attack on the cause of action pled against Chelan County and Defendant Perez. Thus, that claim must be dismissed as abandoned.

7. CONSPIRACY CLAIM: Lawyer Defendants and Chelan County.

Plaintiff pleads the existence of a conspiracy by the Lawyer Defendants acting in concert with state officials to deprive him of constitutional rights. *See, e.g, Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998).

Proof of a conspiracy in violation of § 1983 requires proof of the following elements: (1) an agreement between the defendants to deprive the plaintiff of a constitutional right; (2) an overt act in furtherance of the conspiracy and; (3) a constitutional violation. *See Gilbrook v. City of Westminster*, 177 F.3d 839, 856-57 (9th Cir. 1999) (en banc); *Margolis v. Ryani*, 140 F.3d 850, 853 (9th Cir. 1998); *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539 (9th Cir.), *cert. denied*, 493 U.S. 809 (1989); *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir. 1999); *Askew v. Millerd*, 191 F.3d 953, 957 (8th Cir. 1999); *Hinkle v. City of Clarksburg*, 81 F.3d 416, 421 (4th Cir. 1996); *Villanueva v. McInnis*, 723 F.2d 414, 416 (5th Cir. 1984). Because conspiracies are, by their very nature, secret agreements, "[a] defendant's knowledge of and participation in a conspiracy may be inferred from circumstantial evidence and from evidence of the defendant's actions." *Gilbrook*, 177 F.3d at 857-58.

However, the Ninth Circuit applies a heightened pleading standard to conspiracy claims under section 1983 and has held that mere conclusory allegations of conspiracy (i.e. a bare allegation that a defendant "conspired" with another) are insufficient to state a claim. *Harris v. Roderick*, 126 F.3d 1189, 1195 (9th Cir. 1997); *Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992); *Woodrum v. Woodward County*, 866 F.2d 1121, 1126-27 (9th Cir. 1989).[2] Rather, "[t]o state a claim for a conspiracy to violate one's constitutional rights under section 1983, the plaintiff must state specific facts to support the existence of the claimed conspiracy." *Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989); *Lee v. City of Los Angeles*, 250 F.3d at 679 n.6 (9th Cir. 2001) (plaintiffs must allege facts which are "specific and concrete enough to enable the defendants to prepare a response, and where appropriate, a motion for summary judgment based on qualified immunity."); *Buckey*, 968 F.2d at 794. A plaintiff can meet the heightened pleading standard by alleging "which defendants conspired, how they conspired and how the conspiracy led to a deprivation of his constitutional

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[2] This heightened pleading standard applies in cases where the plaintiff sues an individual defendant (as opposed to a municipality) and the defendant's knowledge or intent is an element of the plaintiff's claim. *Lee v. City of Los Angeles*, 250 F.3d 668, 679 n. 6 (9th Cir. 2001); *Branch v. Tunnell*, 937 F.2d 1382, 1385-86 (9th Cir. 1991) ("Branch I"); *Branch v. Tunnell*, 14 F.3d 449, 452 (9th Cir. 1994) ("Branch II"). The Ninth Circuit has specifically held that since conspiracy claims require the plaintiff to show that the defendant agreed to join the conspiracy, *see Margolis v. Ryan*, 140 F.3d 850, 853 (9th Cir. 1998), they are subject to this heightened pleading standard. *Harris v. Roderick*, 126 F.3d 1189, 1195 (9th Cir. 1997); *Mendocino Envtl. Ctr. v. Mendocino County*, 14 F.3d 457, 459 (9th Cir. 1994) (applying identical standard to conspiracy claim in *Bivens* action).

rights even though he does not identify which officer said or did what at which particular time." *Harris*, 126 F.3d at 1196.

In this case, Plaintiff has alleged, inter alia, that "the lawyer defendants conspired with Chelan County officials to implement a "flat fee" public defense system that did not provide for constitutionally adequate representation of indigent defendants such as Mr. Cunningham." Plaintiff's argument does not make sense: why would an attorney conspire with a public entity to take on a contract and be overworked and underpaid all for the purpose of violating Mr. Cunningham's rights? The defendants must have, "by some concerted action, intend[ed] to accomplish some unlawful objective for the purpose *of harming another* which results in damage." *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999) (quoting *Vieux v. East Bay Reg'l Park Dist.*, 906 F.2d 1330, 1343 (9th Cir. 1990)) (emphasis added). The conspirators must at least share the *same general conspiratorial objective. Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983). It would stretch the bounds of the imagination that a jury could find that the parties engaged in a conspiracy with the purpose in mind of harming the Plaintiff through the negotiation of their public defender contract.

Defendants have raised the issue of the "corrupt" nature of the Plaintiff's claim. As noted in *Fonda*:

> A claim of conspiracy, being dependent on questions of intent, may not always be amenable to disposition on summary judgment. The mere fact that a conspiracy is alleged, however, will not defeat an adequately supported motion for summary judgment. This is especially true in this case where there is actually little disagreement

> over the facts; what is disputed is the legal effect of those facts. But, such a dispute, effectively being a question of law, can quite properly be decided on summary judgment.

Fonda, 707 F.2d at 438 (citations omitted).

The record cannot support an inference of the conspiracy. Plaintiff's claim to survive a summary judgment motion.

8. DEFENDANTS LUCI PEREZ AND DEBRA BAKER'S MOTIONS.

Defendant Debra Baker, former wife of Jeffrey Barker, and Defendant Luci Perez, former wife of Robert Perez, seek summary judgment dismissal based on issues relative to recently changed community and separate property law in the State of Washington. These Defendants and Plaintiff disagree with respect to the application of the new law. *See deElche v. Jacobsen*, 95 Wash. 2d 237 91980; *Keene v. Edie*, 131 Wash. 2d 822 (1997); *Hayley v. Highland*, 142 Wash. 2d 135 (2000).

Due to the fact that it is more appropriately answered by the state court, this Court will decline to rule on Debra Baker's Motion, and encourage her to have it heard in state court.

With respect to the Luci Perez's Motion, the Motion should be denied.

IV. OTHER ISSUES

Daubert Motion. Since Defendants City of Wenatchee, Kenneth Badgley, and Robert Perez's Motion to

Exclude Testimony of Richard Leo was not noted for hearing and the disposition of the underlying Motion did not require consideration of these materials, Defendants' Motion is moot. Defendants may re-note it for consideration at trial.

Statute of Limitations. 42 U.S.C. § 1988 provides that if federal law does not provide a rule of decision in a civil rights case – such as an applicable statute of limitation – federal law will incorporate the appropriate state law, unless that law is inconsistent with the Constitution and laws of the United States. *See also Owens v. Okure*, 488 U.S. 235 (1989) (the statute subscribes the borrowing of state limitations provisions for § 1983 actions, where state provision is consistent with federal law).

Generally, the statute of limitations for a claim under 42 U.S.C. § 1983 is the same as the limitations period for personal injury actions in the forum state. *Wilson*, 471 U.S. at 276. In *Rose v. Rinaldi*, 654 F.2d 546 (9th Cir. 1981), the Ninth Circuit held that the court below improperly applied Washington's two-year intentional tort statute of limitations in a § 1983 case in which the plaintiff alleged that his parole officer violated his civil rights by disclosing information to another prison release program participant that precipitated the stabbing of the plaintiff. In so finding, the court noted that "[t]he need for uniformity in federal laws dictates that Rose's civil rights claim not be characterized as simply an assault or negligence action." *Rose*, 654 F.2d at 547. The circuit court then reviewed Washington's two catch-all limitations statutes – one for three years under Washington statute "for any other injury to the person or rights of another not hereinafter enumerated" and another with a two-year statute for "an action for relief not hereinbefore provided for." *Id.*;

WASH. REV. CODE § 4.16.080(2); WASH. REV. CODE 4.16.130. The *Rose* court found that the three-year limitations period furthered the United States' interest in § 1983 actions "in a limitations period 'sufficiently generous . . . to preserve the remedial spirit of federal civil rights actions.'" *Rose*, 654 F.2d at 547 (*quoting Shouse v. Pierce County*, 559 F.2d 1142, 1146 (9th Cir. 1977) (footnote omitted). See also *Conway v. Standard Ins. Co.*, 23 F. Sup. [sic] 2d 1199, 1200 (E.D. Wash. 1998) (applying Washington's three-year personal injury statute of limitation to claims involving various civil rights statutes); *Matter of Estate of Hansen*, 81 Wash. App. 270, 281 (1996) (finding that Washington's three-year statute of limitations applies in action for deprivation of business owner's civil rights arising from the search of owner's place of business and seizure of items found therein which the city sought to have forfeited for being associated with a controlled substances offense); *Hayes v. City of Seattle*, 76 Wash. App. 877, 880-81 (1995) (holding that "the 3-year limitation period is required by the federal courts' determination that a uniform application of state law limitation periods for personal injury actions is best suited to the remedial purposes of Section 1983"), citing *Robinson v. Seattle*, 119 Wash. 2d 34, 85, (1992), (citing *Wilson v. Garcia*, 471 U.S. 261, 276 (1985)).

Under R.C.W. 4.16.080(2), the statute of limitations for personal injury actions in Washington is three years. Thus, Mr. Cunningham had three years from the date his constitutional claims accrued within which to commence suit.

While the *length* of the limitation period applicable to an action under 42 U.S.C.A. § 1983 is determined from state law, federal law governs when a cause of action

accrues under 42 U.S.C.A. § 1983. *Cabrera v. City of Huntington Park*, 159 F.3d 374, 379 (9th Cir. 1998). Generally, an action brought under § 1983 accrues when the plaintiff "knows or has reason to know of the injury which is the basis of the action." *Trotter v. Int'l Longshoremen's & Warehousemen's Union*, 704 F.2d 1141, 1143 (9th Cir. 1983); *Briley v. State of Cal.*, 564 F.2d 849 (9th Cir. 1977).

However, a state prisoner's cause of action under 42 U.S.C. § 1983 for damages attributable to an unconstitutional conviction or sentence does not accrue, for purpose of the statue of limitations, until the conviction or sentence has been invalidated. *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998), citing *Heck v. Murphy*, 512 U.S. 477, 486-87 (1994).

Here, Mr. Cunningham's sentence was invalidated by order of the Washington Court of Appeals on March 4, 1999. This action was filed on September 26, 2000. Thus, the cause of action was filed well within the three-year accrual period.

State Claims. Plaintiff's First Amended Complaint alleges causes of action for negligence against City of Wenatchee, Perez, and Badgley; Breach of Contract against Chelan County, Barker & Howard, Barker, Baker, and Carroll; Professional Negligence against Barker & Howard, Barker, Baker and Carroll; False Arrest against City of Wenatchee, Chelan County, Perez, Badgley; Interference with Custodial Relations against City of Wenatchee, Badgley, Perez, and Chelan County, Barker & Howard, Barker, Baker & Carroll; and an Outrage/NIED against City of Wenatchee, Badgley, Perez, Chelan County, Barker & Howard, Barker, Baker & Carroll.

Subject matter jurisdiction over these claims is based on 28 U.S.C. § 1367(a) ("in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part o [sic] the same case or controversy. . . . ").

Pursuant to § 1367(c)(3), the Court may decline to exercise supplemental jurisdiction if it "has dismissed all claims over which it has original jurisdiction."

Because the Court is granting judgment for Defendants City of Wenatchee, Chelan County, Barker & Howard, P.S., Inc., Jeffrey Barker, Rebecca Carroll, and Kenneth Badgley on the federal claims asserted against them, it chooses to dismiss without prejudice the common law tort claims asserted against those Defendants. Those claims can be reasserted in state court if Plaintiff wishes to pursue them. Retaining and trying the common law tort claims against these defendants could lead to speculation and confusion by the jury in the event the federal claims against Defendant Perez were tried at the same time.

V. CONCLUSION

The Motions for Summary Judgment of Defendants Chelan County, City of Wenatchee, Kenneth and Jane Doe Badgley, Jeffrey Barker, Barker & Howard, P.S., Inc., Debra Baker, Rebecca Carroll and John Doe Carroll, should be granted.

Robert Perez's and Luci Perez's Motions for Summary Judgment should be denied. Accordingly,

IT IS ORDERED that:

1. Defendant Chelan County's Motion for Summary Judgment, **Ct. Rec. 284**, is **GRANTED.**

2. Defendants City of Wenatchee, Kenneth and Jane Doe Badgley, and Robert Perez's Motion for Summary Judgment Dismissal, **Ct. Rec. 240**, is **GRANTED IN PART and DENIED IN PART.**

(a) Defendants' Motion is **GRANTED** as to Defendants City of Wenatchee and Kenneth and Jane Doe Badgley.

(b) Defendants' Motion is **DENIED** as to Defendant Robert Perez.

3. Defendant Luci Perez's Motion for Summary Judgment, **Ct. Rec. 262**, is **DENIED.**

4. Defendants Barker & Howard, P.S., Inc., Jeffrey Barker, and Debra Baker's Motion for Summary Judgment, **Ct. Rec. 280**, is **GRANTED.**

5. Defendants Rebecca and "John Doe" Carrolls' Motion for Summary Judgment, **Ct. Rec. 276**, is **GRANTED**.

6. The ***ONLY REMAINING DEFENDANTS*** in this case are Robert Perez and Luci Perez. Therefore, the District Court Executive and all parties shall ***REMOVE*** the following Defendants from the caption in all future pleadings:

(a) Defendant Chelan County;

(b) Defendant City of Wenatchee;

(c) Defendants Kenneth and Jane Doe Badgley;

(d) Defendant Barker & Howard, P.S., Inc.;

(e) Defendant Jeffrey Barker;

(f) Defendant Debra Baker; and

(g) Defendants Rebecca and John Doe Carroll.

7. Defendants City of Wenatchee, Kenneth and Jane Doe Badgley, and Robert Perez's Motion to Exclude Testimony of Richard Leo, **Ct. Rec. 344**, is **DENIED AS MOOT** with a right to renew at time of trial.

8. Plaintiff Cunningham's Ex Parte Motion to File Overlength Brief, **Ct. Rec. 368**, is **GRANTED.** Plaintiff's Response to Defendants' Motion to Exclude Testimony of Richard Leo, **Ct. Rec. 367**, is **ACCEPTED AS FILED.**

The District Court Executive is directed to file this Order and provide copies to counsel **VIA FACSIMILE**:

Glenn Draper	206-282-3367
Aryeh Brown	206-332-0154
Michael Pierson	206-389-1708
Patrick McMahon	509-663-0679
John Francis Kennedy	253-853-6479
Jennifer Ilenstine	206-624-5944
James Macpherson	206-780-3868

DATED this 1 day of August, 2002.

/s/ Wm. Fremming Nielsen
WM. FREMMING NIELSEN
UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HENRY H. CUNNINGHAM, Plaintiff-Appellee, v. CITY OF WENATCHEE, Defendant, and, ROBERT R. PEREZ, Defendant-Appellant.	No. 02-35792 D.C. Nos. CV-01-00058-WFN CV-00-01640-JCC Eastern District of Washington, Spokane ORDER (Filed Nov. 21, 2003)

Before: LAY,* FERGUSON, and GOULD, Circuit Judges.

The Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellee's Petition for Rehearing En Banc is also DENIED.

* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

(2)

No. 03-1206

Supreme Court, U.S.
FILED
MAR 24 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

HENRY H. CUNNINGHAM,

Petitioner,

v.

ROBERT R. PEREZ,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PATRICK MCMAHON
CARLSON, MCMAHON & SEALBY, PLLC
37 South Wenatchee Avenue, 3rd Floor, Suite F
Post Office Box 2965
Wenatchee, WA 98807
(509) 662-6131
Attorneys for Respondent

BEST AVAILABLE COPY

I. QUESTIONS PRESENTED FOR REVIEW

Does a police officer violate a father's constitutional right to due process when the officer uses coercive interview tactics with the father's children to extract false allegations of sexual abuse?

Does a police officer violate a father's constitutional right to due process when the officer conceals his use of the coercive interview tactics from prosecutors?

II. LIST OF PARTIES TO THE PROCEEDINGS

The parties to the proceedings are:

Henry H. Cunningham, an individual; and

Robert R. Perez, an individual, formerly a police officer with the City of Wenatchee.

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MISCELLANEOUS

F. SINK & G. GRAEF. In the Courtroom or the Clinic: Intervention Problems and Solutions with Child Sexual Abuse (paper presented at 62nd Annual Meeting of American Orthopsychiatric Association, April 1985 by Fances Sink, Ph.D., Harvard Medical School instructor in child development and psychopathy)..... 4

V. CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

Cunningham v. City of Wenatchee, 345 F.3d 802 (9th Cir. 2003).

Cunningham v. City of Wenatchee, 214 F.Supp.2d 1103 (E.D. Wash. 2002).

VI. STATEMENT OF JURISDICTION

The Respondent agrees with Petitioner's Statement of Jurisdiction set forth in the Petition for Writ of Certiorari.

VII. CONSTITUTIONAL AND STATUTORY PROVISIONS

The Respondent agrees with Petitioner's Constitutional and Statutory Provisions.

VIII. STATEMENT OF THE CASE

A. PETITIONER CUNNINGHAM VOLUNTARILY CONFESSES TO SEXUALLY ABUSING HIS DAUGHTERS.

On June 3, 1994, Henry Cunningham voluntarily confessed to sexually abusing each of his four daughters. He signed his typed confession statement and as a result was arrested for child rape and sexual abuse. On August 15, 1994, Cunningham acknowledged that he was guilty 23 times when asked by the criminal trial court judge how he was pleading to the allegations of sexually abusing his daughters. The court accepted his plea of guilty. The Petitioner does not challenge the legality or voluntariness of his confession in his petition for writ of certiorari.

B. INTERVIEW OF THE CUNNINGHAM DAUGHTERS.

Jessika Cunningham was placed in a mental health facility identified as Pine Crest Hospital by her parents. Preceding Cunningham's confession was a referral from Jessika Cunningham's counselor at the Pine Crest facility made to Child Protective Services reporting that she disclosed having been sexually abused by her father. The referral of Jessika Cunningham's disclosure was forwarded by CPS to the Wenatchee Police Department. On June 9, 1994, Jessika Cunningham was interviewed by Detective Robert Perez and CPS caseworker, Dean Rieman, at the Pine Crest Hospital. During this interview, Jessika related numerous incidences of sexual abuse perpetrated by her father.

On June 10, 1994, Detective Perez of the Wenatchee Police Department interviewed Cunningham's daughters, Jennifer and Sarah Cunningham, who also disclosed that they had been sexually abused by their father. This interview took place at the Wenatchee Police Department.

To date, each of Cunningham's daughters steadfastly maintain that they were victimized by their father's sexual abuse.

C. PROCEDURAL HISTORY/OPINIONS BELOW.

The Petitioner filed his civil lawsuit in the Federal District Court for the Western District of Washington. The court changed venue to the Federal District Court for the Eastern District of Washington. Cunningham alleged violations of 42 U.S.C. § 1983 and numerous state law claims.

Respondent Robert Perez filed a motion for summary judgment requesting the district court to dismiss the § 1983 claims against him on the basis that either no constitutional violation occurred or alternatively that he was entitled to qualified immunity. The district court denied Detective Perez's motion, whereupon, he immediately appealed to the Ninth Circuit Court of Appeals.

In October of 2003, the Ninth Circuit reversed the District Court and ruled that Detective Perez was entitled to dismissal of all civil rights allegations levied by Petitioner Cunningham. The court also ruled that Cunningham's confession was voluntary and provided probable cause for his arrest.

The Petitioner requests review by this Court pursuant to his petition for writ of certiorari.

IX. ARGUMENT

A. THE *DEVEREAUX* TEST SHOULD NOT BE CHANGED.

For the first time, Petitioner argues that the deliberate fabrication of evidence standard articulated in *Devereaux v. Abbey*, 263 F.3d 1070, 1075-76 (9th Cir. 2001) (en banc) should be done away with in favor of the standard utilized in pre-trial identification lineups. Petition at 18. In support of this contention, Cunningham asserts that the *Devereaux* decision is in conflict with decisions in other circuits. *Id.* Petitioner is incorrect.

It is important for the Court to review the evolution of how the *Devereaux* standard developed. The Eighth Circuit Court of Appeals in *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987), dealt with a factually similar case wherein

law enforcement officers were investigating allegations of children who claimed they had been sexually abused. When the criminal case was dismissed, the plaintiffs in *Myers* contended that the officers, in seeking arrest warrants, swearing to complaints and arresting the plaintiffs had deceived judicial officers who found probable cause. *Id.* at 1454. While ultimately granting the officers qualified immunity, the court recognized that investigating child sex abuse allegations involved a "grey" area in investigative procedure based in part on the reluctance of victims of sexual abuse to acknowledge that it has occurred. *Id.* at 1459.

Specifically, the *Myers* Court noted:

> **The uncertainty surrounding acceptable investigative techniques for suspected child sexual abuse derives in part from the unique reluctance of victims of this crime to acknowledge that it has occurred. The record contains materials documenting the reluctance of juvenile sexual abuse and incest victims to disclose the experience. *See, e.g.,* F. SINK & G. GRAEF. In the Courtroom or the Clinic: Intervention Problems and Solutions with Child Sexual Abuse (paper presented at 62nd Annual Meeting of American Orthopsychiatric Association, April 1985 by Fances Sink, Ph.D., Harvard Medical School instructor in child development and psychopathy):**
>
> > **In the clinical setting, a child's reluctance to disclose sexual abuse and seek help or redress is viewed as a reaction *commonly* associated**

> **with abuse ... Children consciously and unconsciously deny memories of their abuse. In some cases, the child's fear of retaliation if they disclose is so strong that they force themselves to pretend and not let on to anyone that the abuse occurred, even with direct questioning. Additionally, the painful feelings associated with the abuse, cannot be tolerated by the child and must be repressed along with memories of the events ... *Id.* When disclosure becomes possible, it takes place in a partial, halting fashion; approaching the threatening material and backing away, revealing abuse, then denying it. This process has been called the "No – Maybe – Sometimes – Yes – " syndrome. *Id.* at 1459-60.**

Finally, the Eighth Circuit in *Myers* noted that "In working with child sex abuse, it is not unusual for children to initially deny being abused." *Id.*

Essentially, the *Myers* court grappled with the issue of child interview techniques and judicial deception to determine if a constitutional violation occurred. The *Myers* court ultimately concluded that flawed interrogation techniques of children without more, did not deprive the investigators of qualified immunity. 810 F.2d at 1460.

In *Snell v. Tunell*, 920 F.2d 673 (10th Cir. 1990), the court dealt with the analysis of civil rights allegations resulting from a child sexual abuse investigation. There, the Tenth Circuit cited the *Myers* decision extensively when analyzing application of qualified immunity to the

allegations of a Fourth Amendment violation. *Id.* at 698. The *Snell* court elaborated on *Myers* and applied the test enunciated by this Court in *Franks v. Delaware*, 438 U.S. 154, 171 (1978), holding that qualified immunity does not provide protection if the plaintiff can make a substantial showing of deliberate falsehood or reckless disregard for the truth, that would be needed to challenge the presumed validity of an affidavit supporting a search warrant. *Snell*, 920 F.2d at 698 citing *Franks v. Delaware*, 438 U.S. 154, 171 (1978) and *Myers*, 810 F.2d at 1457-58.

From this framework of legal analysis dealing with child sex abuse investigations, the *Devereaux* court was presented with allegations that Detective Perez violated the plaintiff's civil rights while investigating complaints that Devereaux sexually abused young girls in his foster home. Detective Perez sought dismissal of the claim pursuant to qualified immunity.

The *Devereaux* court correctly applied the two step process for analyzing qualified immunity set forth by this Court in *Saucier v. Katz*, 533 U.S. 194, 201-04 (2001). The Ninth Circuit after considering all of the allegations in the light most favorable to the plaintiff made it clear that "there is no constitutional due process right to have child witnesses in a child sex abuse investigation interviewed in a particular manner or have the investigation carried out in a particular way. Interviewers . . . must be given some latitude in determining when to credit witnesses' denials and when to discount them . . . Consequently, mere allegations that defendants used interviewing techniques that were in some sense improper, . . . without more, cannot serve as a basis for a claim under § 1983." *Devereaux*, 263 F.3d at 1075.

In completing its analysis, the *Devereaux* court also held, however, that there is a clearly established due process right not to be subjected to criminal charges on the basis of false evidence deliberately fabricated by the government. *Id.* at 1074. The *Devereaux* court therefore developed a test in the context of a child sexual abuse investigation wherein a plaintiff may prevail for a flawed investigation under § 1983 by proving either: (1) the defendants continued their investigation although they knew or should have known that the accused was innocent, or (2) that the defendants used investigative techniques that were so coercive and abusive that they knew or should have known that the techniques would yield false evidence. *Id.* at 1076.

The Petitioner's claim that the above-enumerated test is too stringent is without merit because it essentially does nothing more than unify into one test the protections afforded by the Constitution to be free from deliberately fabricated evidence; as well as protecting due process rights if the investigation techniques while interviewing a child are so coercive that the investigator knew or should have known that it would yield false evidence. In fact, eight of the nine justices in the *Devereaux* decision concurred that there was nothing wrong with the test which was applied in the Petitioner's case at the lower court level. See generally, *Devereaux v. Abbey*, 263 F.3d 1070 (9th Cir. 2001) (en banc).

In other words, the *Devereaux* court scrutinized the examples provided by the plaintiff in that case, and determined what would not support a deliberate fabrication of evidence claim, including the following:

(1) Failing to follow guidelines or to carry out an investigation in a manner that will ensure an error-free result is one thing; intentionally fabricating evidence is quite another other. *Id.* at 1076-77.

(2) Interviewers of child witnesses of suspected sexual abuse must be permitted to exercise some discretion in deciding when to accept initial denials at face value and when to reject them (or withhold judgment on them) and proceed further. *Id.* at 1077.

(3) An allegation that an interviewer disbelieved an initial denial and continued with aggressive questioning of a child cannot, without more, support a deliberate fabrication of evidence claim even if the allegation is amply supported by the evidence. *Id.* at 1077.

(4) Repeated admonitions to be truthful made to a child by an interviewer do not amount to a constitutional violation for deliberate fabrication of evidence, in the absence of any independent allegations or evidence, the interviewer knew or should have known the alleged perpetrator was innocent or the child had already told the truth when making an initial denial of abuse. *Id.* at 1077.

(5) Allegations that an interviewer held an "animus and preconception" against a perpetrator, which lead to the intentional manipulation of child witnesses, are insufficient to establish a constitutional violation when it is plausible that the interviewer held a good faith belief that . . . [the alleged perpetrator] was guilty, which could lead to aggressive or manipulative questioning of the child witness in order to get them to testify truthfully, if reluctantly, to his guilt. *Id.* at 1078.

(6) Unsuccessful use of coercive techniques, such as threatening a child with criminal charges if the child does not change her recantation of abuse, which do not yield any false testimony even though . . . applied to an especially vulnerable witness . . . can hardly serve as a basis for a claim of deliberate fabrication of evidence. *Id.*

(7) Truthfully informing a witness about another witness' corroboration is not such an inherently coercive technique that . . . [the interviewer] knew or should have known would lead to false information . . . [the interviewer] could have reasonably believed that by taking [the child's] side, so to speak, would gain trust and persuade the child to describe what sort of abuse had really taken place. *Id.* at 1079.

Using a confession does not amount to the use of investigative techniques that were so coercive or abusive that the interviewer knew or should have known that such would yield false information. *Id.* at 1079.

(8) Driving a child around the community and asking where the crimes that the child allegedly witnessed took place is surely not such a coercive and abusive technique that . . . [an interviewer] should have known that it would lead to false information. *Id.*

Hence, it is obvious that the Petitioner's complaint about the *Devereaux* deliberate fabrication of evidence test, is based primarily on the complete lack of evidence presented to persuade the lower court that his due process rights were violated. The Petitioner's argument that the *Devereaux* test conflicts with decisions in other circuits is meritless. As pointed out, any individual's due process rights are scrutinized by a court to verify whether information that was used against that person in a criminal

proceeding was either deliberately fabricated or was obtained in a coercive manner crossing the line into a due process violation.

The cases cited by the Petitioner, *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997) and *Michaels v. New Jersey*, 222 F.3d 118 (3rd Cir. 2000), *cert. denied*, 531 U.S. 118 (2001), are essentially in accord with the *Devereaux* test although neither case articulated the exact language of the *Devereaux* test. Nevertheless, the court in each case scrutinized the statements utilized to determine if they were either deliberately fabricated or extracted from the provider in a manner that was so coercive that it violated the due process rights protected under the Fourteenth Amendment. If either of these two scenarios were satisfied, the plaintiff would be able to avoid summary judgment dismissal based on qualified immunity.

Accordingly, the *Devereaux* test for analyzing child sex abuse investigation does in actuality take into account the "totality of the circumstances" of how the evidence was obtained. If the evidence violates the due process rights of the claimant, qualified immunity is denied and remedies available under 42 U.S.C. § 1983 survive.

B. THE NINTH CIRCUIT PROPERLY ANALYZED PETITIONER'S EXCULPATORY EVIDENCE CLAIM.

Once again, for first time, Cunningham argues that the Ninth Circuit should have applied the test articulated in *California v. Trombetta*, 467 U.S. 479, 488-89 (1984) as opposed to applying the "bad faith" standard set forth in *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). Petition at 26-29. Under either test, the lower court properly determined

that Cunningham failed to allege specific non-conclusory facts to survive summary judgment dismissal.

Initially, it should be pointed out that Cunningham failed to argue, cite, or brief the *Trombetta* decision for the Ninth Circuit. Despite the omission the court nevertheless considered and analyzed *Trombetta* and ruled that Cunningham failed to submit satisfactory evidence to survive summary judgment dismissal. See *Cunningham v. Perez*, 345 F.3d 802, 812 (9th Cir. 2003).

In reality, Cunningham failed to present evidence of bad faith on the part of Detective Perez for not preserving what may or may not have been exculpatory evidence. Moreover, as far as the allegation that Detective Perez failed to document interrogations and did not keep a record of Jennifer and Sara Cunningham's initial denials of abuse, there is no constitutional requirement that a police officer preserve field notes. See *California v. Trombetta*, 467 U.S. 479, 488-89 (1984). (California's policy of not preserving breath samples held not to constitute a constitutional defect because the Constitution imposed only a duty on the State to preserve evidence which both possesses an exculpatory value that was apparent before the evidence was destroyed and was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.) The Ninth Circuit was correct in pointing out that Cunningham failed to show that any information contained in the notes was not also provided in the police reports or that any alleged omitted information was, indeed, exculpatory. Accordingly, Petitioner's dissatisfaction with the lower court's ruling is not sufficient for this Court to grant his petition for writ of certiorari.

X. CONCLUSION

The *Devereaux* standard establishes adequate protections for children who have been sexually abused as well as protecting the due process rights of persons being accused. The methodology in obtaining disclosures from these children under the *Devereaux* standard is scrutinized under a totality of the circumstances analysis, and, if false or coerced evidence violates a plaintiff's due process rights, his remedies lie in a claim pursuant to 42 U.S.C. § 1983.

Additionally, Petitioner has failed to persuade this Court to grant a writ of certiorari to upset the Ninth Circuit's decision and Respondent respectfully requests this Court to deny the same.

Respectfully submitted,

Patrick McMahon
(*Counsel of Record*)
Attorney for Respondent
Robert R. Perez